

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

BETWEEN:

DENIS RANCOURT

APPLICANT
(Defendant)

–and–

JOANNE ST. LEWIS

RESPONDENT
(Applicant)

–and–

THE UNIVERSITY OF OTTAWA

RESPONDENT
(Rule 37 Affected Party)

MEMORANDUM OF ARGUMENT OF THE RESPONDENT,
THE UNIVERSITY OF OTTAWA

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D	<i>Caron v. Canada (Employment & Immigration Commission)</i> , [1991] 1 S.C.R. 48
E	<i>Committee for Justice and Liberty v. Canada (National Energy Board)</i> , [1978] 1 S.C.R. 369
F	<i>Danson v. Ontario (Attorney General)</i> , [1990] 2 S.C.R. 1086
G	<i>Danyluk v. Ainsworth Technologies Inc.</i> , [2001] S.C.J. No. 46
H	<i>Denis Rancourt v. Joanne St. Lewis, et al.</i> , 2013 CanLII 40335 (SCC)
I	Donald J. Lange, <i>The Doctrine of Res Judicata in Canada</i> , Third Ed. (Markham: LexisNexis Canada Inc., 2010)
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L	<i>Lloyd v. Bush</i> , 2012 ONCA 349, 110 O.R. (3d) 781
M	<i>Mignacca v. Merck Frosst Canada Ltd.</i> , 2009 ONCA 393, 96 O.R. (3d) 164
N	Peter Hogg, <i>Constitutional Law of Canada</i> , 5th ed, vol 2 (Scarborough, Ont: Thomson Carswell, 2007)
O	<i>R. v. Kapp</i> , [2008] 2 S.C.R. 438

- P *R. v. R.D.S.*, [1997] 3 S.C.R. 484
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- W *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259
- X *Whitbread v. Walley*, 1988 CanLII 2819 (BCCA), appeal to SCC dismissed

TAB 1

IN THE SUPREME COURT OF CANADA
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BETWEEN;

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APPLICANT
(Defendant)

—and—

JOANNE ST. LEWIS

RESPONDENT
(Applicant)

—and—

THE UNIVERSITY OF OTTAWA

RESPONDENT
(Rule 37 Affected Party)

CERTIFICATE OF THE RESPONDENT,
THE UNIVERSITY OF OTTAWA
(Form 23A, pursuant to Rule 23 of the *Rules of the Supreme Court of Canada*)

I, Peter Doody, counsel for the Respondent, the University of Ottawa, certify that:

(a) there is no sealing or confidentiality order in effect in the file from a lower court or the Court and there are no documents filed including any information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation.;

(b) there is no ban on the publication of evidence or the names or identity of a party or witness under an order or legislation and there is no document filed that includes information subject to any ban; and

(c) there is no information that is subject to limitations on public access under legislation, and there is no document filed that includes information that is subject to any limitations.

Dated at Ottawa, Ontario this 24th day of January, 2014.



cf Peter Doody

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TAB 2

MEMORANDUM OF ARGUMENT OF THE RESPONDENT, THE UNIVERSITY OF OTTAWA

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Applicant, Denis Rancourt, seeks leave to appeal to this Court from an order of the Court of Appeal for Ontario which refused to grant an interlocutory motion seeking to dismiss a libel action on the basis of champerty and maintenance. His submissions in this Court are that Beaudoin J., a judge of the Superior Court, was in a position of reasonable apprehension of bias when he refused to order that questions be answered which were objected to during a cross-examination on affidavits filed in that interlocutory motion. On November 29, 2012, Annis J. dismissed a motion seeking leave to appeal Beaudoin J.’s decision and held that Beaudoin J. was not in a position of reasonable apprehension of bias. This Court dismissed Mr. Rancourt’s Application for Leave to Appeal from Annis J.’s decision on July 4, 2013.

2. Mr. Rancourt’s application should be dismissed.

(a) Either:

- (i) This Court had jurisdiction to hear the Application for Leave to Appeal from Annis J.’s decision, or
- (ii) This Court did not have jurisdiction to hear the Application for Leave to Appeal, because Annis J.’s decision was not a decision of the “final or other judgment ... of the highest court of final resort in a province”; Mr. Rancourt’s remedy was to seek, from another judge of the Superior Court, leave to appeal Annis J.’s decision to the Divisional Court, and he chose to not do so.

In either case, the issue of whether Beaudoin J. was in a position of reasonable apprehension of bias is *res judicata*, decided by this Court and/or Annis J., and cannot be re-litigated.

(b) There are no questions of national importance relating to whether ss. 7, 11(d) and 15(1) of the *Charter* encompass a right for every individual litigant to an impartial process. There are no ss. 7, 11(d) or 15 *Charter* issues which arise in this case. Furthermore, Mr. Rancourt’s *Charter* arguments were not considered by the Court below

and there is no proper evidentiary record before the Court to support a decision on these issues.

(c) Nor does the proposed appeal raise questions of national importance relating to whether the principle of “automatic disqualification” on issues of reasonable apprehension of bias exists in Canada. This Court has definitively stated that the appropriate test was established by this Court in *Committee for Justice and Liberty v. Canada (National Energy Board)*¹ and that this principle is not part of the law of this country. The issue does not need to be revisited, particularly on the facts of this case.

(d) In any event, there was no reasonable apprehension of bias. The bases of the allegation of a reasonable apprehension of bias on the part of Beaudoin J. do not rise to the level of anything that would qualify for “automatic disqualification”. Justice Beaudoin’s son, who had been a lawyer at the firm representing the University, had passed away and the firm had named a meeting room in his honour. Justice Beaudoin had also established a scholarship at the University of Ottawa, Faculty of Common Law in his late son’s memory. Those facts, separately or together, do not raise any issue of reasonable apprehension of bias.

B. Statement of Facts

1) The libel action and Mr. Rancourt’s champerty motion

3. The Plaintiff/Respondent, Joanne St. Lewis, is a woman of colour and a professor at the University of Ottawa, Faculty of Common Law. Mr. Rancourt, a former professor of physics at the University, published comments on his internet blog in which he referred to Ms. St. Lewis as “Allan Rock’s house negro”. Mr. Rock is the President of the University. That defamatory description was made following Ms. St. Lewis’ preparation of a report requested by the University of Ottawa on the issue of whether there was “systemic racism” within the University’s student appeal process. Ms. St. Lewis sued Mr. Rancourt for libel.

4. Mr. Rancourt brought an interlocutory motion in that libel action (the “champerty motion”), seeking an order that the action be stayed or dismissed on the ground that the action is

¹ [1978] 1 S.C.R. 369, *University’s Response*, Tab 4E

a result of what is alleged to be a champertous agreement in that the University of Ottawa is reimbursing Ms. St. Lewis for her legal fees incurred in the litigation.

Notice of Motion in Champerty Motion, dated January 5, 2012; Response of the University of Ottawa ("University's Response"), Tab 3A

5. The University applied to intervene in the champerty motion. Beaudoin J., who had been assigned as the case management judge, ruled at a case conference that no leave was required because the University would be affected by the order sought by Mr. Rancourt and it had the right to file material in response to that notice of motion.

Endorsement of Beaudoin J., February 8, 2012; University's Response, Tab 3B

2) The June 20 refusals motion: one of the decisions from which Annis J. denied leave to appeal

6. In the champerty motion, the University filed affidavits sworn by Allan Rock and by Céline Delorme, counsel to the University in a labour arbitration which Mr. Rancourt's union had brought after he was dismissed. Both were cross-examined by Mr. Rancourt. Mr. Rancourt also examined Robert Giroux, Chair of the Board of Governors of the University of Ottawa, as a witness on the champerty motion pursuant to Rule 39.03 of the Ontario *Rules of Civil Procedure*.

7. Ms. St. Lewis also filed affidavits in the champerty motion, and those witnesses were also cross-examined by Mr. Rancourt.

8. During those cross-examinations, Mr. Rancourt asked for the production of a number of documents, and asked a number of questions, to which counsel for the University and counsel for Ms. St. Lewis objected on the basis that they were irrelevant.

9. Mr. Rancourt brought an interlocutory motion within the champerty motion seeking an order requiring that those questions be answered and documents produced (the refusals motion). That refusals motion was heard by Beaudoin J. on June 20, 2012.

10. Ruling from the bench on June 20, Beaudoin J. dismissed each and every requested order sought by Mr. Rancourt as they related to the University's objections. On August 2, 2012, Beaudoin J. released reasons setting out the legal principles underlying his June 20 dismissal. He did not, as Mr. Rancourt infers at paragraph 19 of his factum, make the decisions on August 2.

The chart below sets out the issues dealt with by Beaudoin J., the pages in the transcript of the June 20 hearing which record those decisions, and the paragraphs in his reasons of August 2, 2012 which repeat those rulings.

Decision made on June 20	Ruling	Location in Transcript	Location in Reasons
Request to Adjourn the motion for the purpose of cross-examining Alain Roussy' affidavit served June 14, 2012, on the grounds that Mr. Roussy, University in-house counsel had "perjured" himself.	Adjournment refused.	pp. 17 to 19	paras. 21 to 23
Motion to exclude Alain Roussy's affidavit.	Motion dismissed.	pp. 23-24	Not referred to
Examination of Robert Giroux			
Request for documents as set out in the Summons to Witness	All relevant documents have been produced; undertakings not required from witness examined under Rule 39.02; questions relate to credibility only	p.121, lines 21 to 23; p.129; lines 1 to 3	p.11
No. 2: University liability policies (QQ.11 to 12)	Answered; there is no policy that covers this situation: in any event, not relevant.	p.92, lines 15 to 23	p.8
No. 3: University policies for funding legal costs (QQ.13 to 22)	Answered; moreover witness not required to give an undertaking. Answered by another witness.	p.97, lines 1 to 30	p.8
No. 4: University budget for outside legal fees in a typical year (Q.37)	Not relevant.	p.98, lines 13 to 22	p.8
No. 5: Witness to search email accounts (QQ.124 to 135)	Answered; it was a telephone communication. Otherwise, questions not relevant or too vague. Witness has no obligation to give undertakings.	p.100, line 29 to p.101, line 4	p.9
No. 6: Relevant communications (QQ.136 to 154)	Answered; it was a telephone communication. A search was undertaken. No reason to conduct an e-mail search; this is a fishing expedition.	p.102, lines 1 to 2	p.9
No. 7: Information about agenda for October 19, 2011 (QQ.188 to 194)	Witness answered. Who was at the meeting is not relevant.	p.102, lines 25 to 26	p.9
No. 8: Witness's reaction to University sharing the proceeds (Q.244)	Mr. Giroux's reaction is not relevant nor is his opinion on the conflict with any University policy.	p.103, line 3	p.9

Decision made on June 20	Ruling	Location in Transcript	Location in Reasons
No. 9: Expected cost of the litigation (Q.273)	Not relevant; cases cited by the Defendant are not applicable; class action cases.	p.106, lines 1 to 14	p.9
No. 10: Reasons why the litigation is important (QQ.286 to 287)	Not relevant.	p.107, lines 29 to 33	p.10
No. 11: Cap on the amount to fund litigation (Q.341)	Cap on funding is not relevant.	p.108, line 5	p.10
No. 12: Financial impact of the Agreement (QQ.348-351)	Not relevant. Pure speculation on the part of the Defendant.	p.108, lines 27 to 28	p.10
No. 13: University policy limiting discretionary funding (QQ.357, 359 and 360)	Not relevant. To the extent that the question was at all relevant, it was answered. No requirement of a witness to give an undertaking.	p.110, line 7	p.10
No. 14: Quantum that triggers control on capital expenditures (Q.362)	Not relevant.	p.110, line 15	p.10
No. 15: University policy about surveillance (Q.381)	Not relevant to the matters raised in the Notice of Motion. Dr. Rancourt was aware of surveillance of himself in 2008 before Mr. Rock became President, moreover, this is being litigated in the labour arbitration.	p.115, lines 18 to 21	pp.10-11
No. 16: Acceptable practices of surveillance (QQ.383-393)	Not relevant.	p.116, line 19	p.11
No. 17: University policy about obtaining/using medical information (Q.416)	Not relevant.	p.116, lines 18 to 21	p.11
No. 18: Acceptable practice of third party psychiatric evaluations (QQ.421-426)	Not relevant.	p.116, lines 18 to 21	p.11
Cross-Examination of Alan Rock			
Items 1-10	Abandoned by Mr. Rancourt as a result of earlier rulings.	p.129, line 17 to p.130, line 9	p.12
No. 11: Common Motives for dismissal and maintenance (QQ.508, 510-511, 513, 515, 517-518, 520, 525)	Not relevant to the issues pleaded in the Notice of Motion or supporting affidavit. Mr. Rancourt refers to documents that he will need leave to produce at the Champerty Motion; he can't introduce them now. The dismissal is not being tried in	p.139, line 5, to p.143, line 14	p.12

Decision made on June 20	Ruling	Location in Transcript	Location in Reasons
	this forum.		
Nos. 12 to 13	Abandoned by the Defendant as a result of earlier rulings.	p.144, lines 7 to 15	p.12
Item 5 (from Notice of Examination): All documents relevant to this litigation	Seven relevant documents were produced. Remaining documents sought are not relevant or are covered by solicitor client privilege. Request is too broad. This is not a motion for a better affidavit of documents.	p.157, lines 11 to 19	p.12
Cross-examination of Céline Delorme			
Nos. 1 and 2	Not pursued in the light of previous rulings.	p.150, line 30 p.151, line 2	pp.12-13
No. 3; Credibility of Exhibit "A" (QQ.65, 67, 70-72, 133-134, 138)	Exhibit "A" is the document that was filed in the arbitration. There is no contradiction. Not relevant to the Champerty Motion.	p.149	p.13

Transcript, June 20, 2012, *University's Response*, Tab 3C

St. Lewis v. Rancourt, 2012 ONSC 4494 at pp. 5, and 8-13; *University's Response*, Tab 4R

11. Mr. Rancourt's refusals motion in respect of the University's objections was completed on June 20, 2012, but the portion of the refusals motion relating to Ms. St. Lewis' objections was re-scheduled to be heard on July 24, 2012. As all parties knew, counsel for the University was not available on July 24, but this did not matter because the part of the motion dealing with the University's objections had been heard and decided by Beaudoin J. on June 20.

Transcript, June 20, 2012, p. 159, lines 6 to 23; *University's Response*, Tab 3C

3) The July 24 continuation of the refusals motion: Mr. Rancourt, without notice, alleges that Beaudoin J. is in a position of reasonable apprehension of bias

12. On July 24, 2012, before Mr. Dearden could make his submissions on behalf of Ms. St. Lewis, and in the absence of the University's counsel, Mr. Rancourt stated:

Je demande que la motion présente soit ajournée pour me permettre d'étudier le procès-verbal de notre dernière séance et de déposer une motion pour demander que

vous vous récusiez pour crainte raisonnable de partialité et d'apparence d'un conflit d'intérêt.

Transcript, July 24, 2012, p.3, lines 10 to 15; *University's Response*, Tab 3D

13. Mr. Rancourt stated:

Alors, j'ai ici – trouvé un article, auquel je viens juste de découvrir en faisant cette recherche il y a un jour, qui a apparu dans *le Citizen* le 24 avril 2012.

J'en donne une copie à M. Dearden et je vous en donne une copie.

Dans cet article, qui pourrait contenir des erreurs factuelles mais qui aussi pourrait être correct – de toute façon, c'est ce que le public voit – on dit, à la première page... .

On parle de votre fils et on dit :

« Beaudoin is still picking his way through the rocky landscape of grief. »

Donc cette affaire vous préoccupe encore beaucoup.

Et un peu plus bas, on dit :

« Says Beaudoin, 'One impulse you have when you lose a child is to make sure their name isn't lost and people remember them.' »

Dans l'article vous expliquez que c'est une chose que vous faites pour garder la mémoire de votre fils en vie.

Et un peu plus tard dans cet article, il est dit :

« The first – after a few rough months, the first step his family took was to set up a scholarship in Iain's name at the University of Ottawa Law School. Beaudoin was also delighted that the law firm Borden Ladner Gervais, where his son was a second-year patent lawyer, named a meeting room after him. »

Et ensuite on vous cite en disant :

« So every day someone says, 'You can meet in the Iain Beaudoin Room.' »

Alors il y a, M. Le Juge

Transcript, July 24, 2012, p.27, line 18 to p.29, line 12; *University's Response*, Tab 3D

14. The transcript discloses the following exchange between Mr. Rancourt and the Court:

LE TRIBUNAL : Je trouve vos remarques tellement choquantes et provoquantes, qui voulaient utiliser l'angoisse que j'éprouve au décès de mon fils et d'un projet qu'on a lancé dans la communauté à sa mémoire, ou prétendent que cet esprit d'angoisse me bouleverse tellement que je suis incapable de trancher les questions en jeu, je – je trouve ça... .

M. RANCOURT : Je n'ai pas prétendu ça, M. Le Juge. J'aimerais corriger. Je n'ai pas...

LE TRIBUNAL : Je trou'... .

M. RANCOURT : ... prétendu ça.

LE TRIBUNAL : Je trouve tellement choquant qu'un homme qui se dit professionnel à la recherche de la justice a pu pencher aussi bas que ça.

M. RANCOURT : Mais permettez-moi de faire mon argument, M. Le Juge.

motion est complètement – de retard – est rejetée.

M. RANCOURT : M. Le Juge... .

LE TRIBUNAL : Nous procédons.

M. RANCOURT : M. le Juge,...

LE TRIBUNAL : Nous procédons.

M. RANCOURT : ...je n'ai même pas fait mon argument.

LE TRIBUNAL : Nous procédons.

M. RANCOURT : M. Le Juge... .

LE TRIBUNAL : Nous procédons.

M. RANCOURT : Je n'ai pas fait mon argument.

LE TRIBUNAL : Nous procédons.

M. RANCOURT : J'ai lu...

LE TRIBUNAL : Nous procédons.

M. RANCOURT : ...quelques pages.

THE COURT: Go ahead with... .

avez une entente financière avec l'Université d'Ottawa.

Il y a une bourse au nom de votre fils. L'Université d'Ottawa a dû approuver cette entente financière. Elle peut annuler cette entente financière. Et vous avez exprimé publiquement, M. le Juge, que c'est – c'est...

LE TRIBUNAL : Je répète... .

M. RANCOURT : ...c'est important pour vous.

motion pour un ajournement est refusée. Refusée. Continue.

M. RANCOURT : Et donc est-ce qu'on... .

LE TRIBUNAL : Est refusée.

M. RANCOURT : Oui. Est-ce que on... .

LE TRIBUNAL : Motion d'ajournement – refusée.

M. RANCOURT : J'avais... .

LE TRIBUNAL : Refusée!

M. RANCOURT : D'accord. J'ai compris.

M. Le Juge, je tiens à signaler que vos... .

LE TRIBUNAL : Je prends une pause, et quand je reviens, dans 15 minutes, si vous osez continuer cette attaque personnelle contre moi en évoquant la mémoire de mon fils, je vais vous reconnaître en outrage au Tribunal. Nous procédons, dans un retard de 15 minutes, avec la motion pour les refus.

Transcript, July 24, 2012, p.30, line 15 to p.33, line 23; *University's Response*, Tab 3D

4) The July 24 decision – Beaudoin J. rules that he was not in a position of reasonable apprehension of bias as a result of his late son having been employed at the law firm representing the University or having established a University scholarship in memory of his late son, but that Mr. Rancourt's provocation prevented him from being able to be just towards him thenceforth

15. On his return to the courtroom, Beaudoin J. made this further statement with interjections by Mr. Rancourt:

LE TRIBUNAL : M. Rancourt, je tiens à souligner qu'il n'y a, à mon avis, aucun conflit entre moi et l'Université d'Ottawa à cause d'une bourse qu'on a créé à la mémoire de mon fils.

Il n'y a pas de possibilité d'annuler cette bourse.

C'est un contrat qui était conclu entre moi, le gouvernement de l'Ontario, qui a également contribué en fonds sommes égales, l'établissement de cette bourse.

Pas de possibilité d'annuler cette bourse. Il y a pas de conflit d'intérêts.

Par contre, je trouve que votre geste ce matin en me remettant une copie de cette article qui existe depuis trois mois... .

Et vous faites ça souvent, hein? Vous arrivez à la dernière minute. Vous vous prétendez, « Je viens de découvrir. » C'est un truc favori chez vous.

Pourtant, c'était dans le grand public depuis trois mois.

Et vous tenez non seulement à lire le paragraphe qui fait référence à la bourse, vous tenez à souligner l'angoisse que j'éprouve toujours auprès de la mort de mon fils.

Jamais, jamais de ma carrière juridique, que j'ai vu un geste aussi écoeurant, provoquant, et complètement indigne. Vous aurez pu faire ça. Pour...

M. RANCOURT : M. le Juge, je ...

LE TRIBUNAL : ...prendre mon angoisse et me le jeter en face comme ça...

M. RANCOURT : M. le Juge, c'est... .

LE TRIBUNAL : ...j'ai, malheureusement... .

... . Vous... .

avez réussi. Vous avez réussi, M. Rancourt. Je ne peux plus continuer à présider dans votre présence. Je serais incapable. Vous avez réussi.

Vous m'avez provoqué tellement avec ce geste le plus pénible on aurait pu m'imposer, que je suis incapable d'être juste envers... ,

Il faudra trouver un autre juge présider, acquitter frais, des frais dépens de cette présence aujourd'hui.

M. RANCOURT : M. le Juge, je dois signaler... ,

COURT SERVICES OFFICER : Order. All rise.

M. RANCOURT : M. le Juge... ,

Transcript, July 24, 2012, p.34, line 1 to p.37, line 11; *University's Response*, Tab 3D

5) November 29, 2012 – Annis J. dismisses Mr. Rancourt's motion for leave, ruling that this was not a case that could possibly give rise to a reasonable apprehension of bias

16. Mr. Rancourt then brought a motion before Annis J. seeking leave to appeal to the Divisional Court from Beaudoin J.'s order on the refusals motion, pursuant to s. 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Ontario Rules of Civil Procedure*, submitting that Beaudoin J. had been in a position of reasonable apprehension of bias on June 20, 2012.

Mr. Rancourt's Notice of Motion, dated July 30, 2012, for motion before Annis J. (referred to as "Notice of Motion to Annis J."); *University's Response*, Tab 3E

17. Annis J. dismissed Mr. Rancourt's motion for leave to appeal on Nov. 29, 2012. He noted that Rule 62.02 provided that leave to appeal could only be granted if there was a conflicting decision by another judge or court on the matter involved and it was, in his opinion, desirable that leave be granted or if there appeared to him to be good reason to doubt the correctness of the order in question and the proposed appeal involved matters of such importance that leave should be granted. He decided that neither of these grounds was met. He held that:

(a) The appropriate test for reasonable apprehension of bias was as set out in the decision of the Ontario Court of Appeal in *Bailey v. Barbour*² (which had its origin in this Court's decision in *Committee for Justice and Liberty v. Canada (National Energy Board)*, *supra*) as follows:

... what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he or she think it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

² 2012 ONCA 325, 110 O.R. (3d) 161 at para. 16; *University's Response*, Tab 4A

St. Lewis v. Rancourt, 2012 ONSC 6768, para. 37 (referred to as “Annis J.’s Bias Decision”); *University’s Response*, Tab 4S

(b) The test was an objective one, to be applied upon an assessment of the record in its totality, with the interventions complained of evaluated cumulatively from the perspective of a reasonable observer, and with isolated expressions of impatience or annoyance by a judge as a result of frustrations not by themselves creating unfairness³.

Annis J.’s Bias Decision, para. 38; *University’s Response*, Tab 4S

(c) There is a strong presumption in favour of the impartiality of a trier of fact.

Annis J.’s Bias Decision, para. 39; *University’s Response*, Tab 4S

18. Annis J. wrote:

This is not a case that could possibly give rise to a reasonable apprehension of bias on the part of Beaudoin J. There are no interventions or declarations by him that could lend themselves to a concern of partiality. He is not personally involved in any of the circumstances of the case. There is nothing the defendant could point to in Beaudoin J.’s conduct which could begin to suggest that he somehow favoured the University.

Moreover, the University is a large quasi-governmental institution in our community. Being multifaceted, ubiquitous and amorphous, it is anonymous and thus does not permit a suggestion that a judge by setting up a memorial scholarship in the name of his departed son could give rise to an apprehension that the judge might be favourably disposed to the University in litigation brought before him or her.

The University was merely the means whereby Beaudoin J. could obtain some solemnity from the untimely death of his son in establishing a scholarship for others who wished to study at the University. Actions of this nature intended to benefit Society, even if taken to memorialize a close relation, are not the type of conduct that consciously or unconsciously could suggest a judge cannot act fairly.

Similarly, no reasonable apprehension of a favourable consideration by Beaudoin J. towards the University could possibly arise by the University being represented by a law firm that had named one of its meeting rooms in memory of his son where he was working at the time of his premature demise.

It is unreasonable to suggest that the mere act of respect by a law firm towards one of its associates who was the son of a judge and whose untimely death touched the firm could indirectly cause the judge to be biased in favour of the law firm’s clients. Were this to be the case, Beaudoin J. could not hear any case pleaded by Borden Ladner Gervais LLP. This is an untenable proposition that fails to recognize that lawyers are officers of the court who are required to advance their clients’ interests without adopting them as their own.

³ citing *Lloyd v. Bush*, 2012 ONCA 349, 110 O.R. (3d) 781 at paras. 25-26; *University’s Response*, Tab 4L

Annis J.'s Bias Decision, paras. 40-44; *University's Response*, Tab 4S

6) January 4, 2013 – This Court denies leave to appeal Annis J.'s decision

19. On January 4, 2013, Mr. Rancourt sought leave to appeal to this Court from Annis J.'s dismissal of his leave motion. He did so despite having been notified by counsel for Ms. St. Lewis that the Supreme Court of Canada had no jurisdiction to hear such an appeal and that the proper route was to seek leave to the Divisional Court.

Letter dated December 11, 2012 from Gowlings to Ontario Superior Court of Justice Smith (cc. Denis Rancourt), Exhibit "N" to the Affidavit of Kaitlin Short, *St. Lewis Response*, Tab 8N, pp. 137-138

20. In his January 4, 2013 Notice of Application for leave to appeal to this Court, Mr. Rancourt proposed to raise questions of national importance relating to whether Beaudoin J. was in a position of reasonable apprehension of bias.

Mr. Rancourt's Notice of Application for Leave to Appeal to the Supreme Court of Canada, dated January 4, 2013; *University's Response*, Tab 3F

21. This Court dismissed Mr. Rancourt's leave application, with costs, on July 4, 2013.

Denis Rancourt v. Joanne St. Lewis, et al., 2013 CanLII 40335 (SCC) (referred to as "2013 SCC Dismissal"); *University's Response*, Tab 4H

7) March 13, 2013 - Smith J. dismisses the champerty motion and Mr. Rancourt appeals to the Court of Appeal for Ontario

22. Smith J. dismissed the champerty motion, holding that: the University's agreement to pay for Ms. St. Lewis's legal costs of the libel action did not constitute champerty and maintenance; the University had not engaged in "officious intermeddling" in the litigation; there was a legitimate reason for the University's assisting Ms. St. Lewis because her reputation was damaged in the course of her employment; there was no agreement that the University would share in the proceeds of the litigation; and there was no "trafficking in litigation".

St. Lewis v. Rancourt, 2013 ONSC 1564 at paras. 77 to 103, (referred to as "Smith J.'s Champerty Motion Decision"); *University's Response*, Tab 4U

- 8) Nov. 8, 2013 - The Court of Appeal dismisses Mr. Rancourt's appeal of Smith J.'s ruling, holding that the question of a reasonable apprehension of bias was fully considered by Annis J., with whom they agreed, and that the decision was not open to challenge before them in any event

23. On April 12, 2013, Mr. Rancourt filed a Notice of Appeal from that decision in the Ontario Court of Appeal. The first ground of appeal cited was reasonable apprehension of bias of Beaudoin J.

Notice of Appeal of Champerty Motion Decision to Court of Appeal for Ontario,
April 12, 2013, paras. 9-10; *University's Response*, Tab 3G

24. On November 8, 2013, the Court of Appeal unanimously dismissed Mr. Rancourt's appeal. The Court wrote:

We are not persuaded that any of the several grounds he [Mr. Rancourt] advances has merit. We see no error of law on the part of the motion judge in concluding on the ample evidence before him that the respondent's employer's decision to fund the litigation did not amount to maintenance or champerty. Nor did the respondent's unilateral decision to donate a portion of any punitive damages she might receive to a scholarship at the employer university make out maintenance or champerty. Moreover, the underlying findings of fact made by the motion judge were reasonably supported by the record.

As to the appellant's bias or appearance of bias submission, it in our view has no merit. It was fully considered by Annis J. and rejected. We agree with that decision and, in any event, that decision is not open to challenge in this court.

St. Lewis v. Rancourt, 2013 ONCA 701 (referred to as the "Court of Appeal's Dismissal of the Champerty Appeal"); *University's Response*, Tab 4T

25. Mr. Rancourt now seeks leave to appeal the decision of the Court of Appeal to this Court.

PART II – QUESTIONS IN ISSUE

26. The following issues arise in this Leave Application:

- (a) Whether the proposed appeal raises issues that are *res judicata*; and
- (b) If the issues are not *res judicata*, whether there is a question of public importance in respect of the issues raised by Mr. Rancourt, namely:

- (i) Do sections 7, 11(d) and/or 15(1) of the *Charter* encompass a right for every individual civil litigant to an impartial process, both real and apparent?; and
- (ii) If there is such a right, consistent with *Charter* principles, what form does it take in judicial practice?

PART III – STATEMENT OF ARGUMENT

A. The issue of whether Beaudoin J. was in a position of reasonable apprehension of bias has been finally decided and is *res judicata*

27. As this Court held in *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46:

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Danyluk v. Ainsworth Technologies Inc., [2001] S.C.J. No. 46 at para. 18; *University's Response*, Tab 4G

Donald J. Lange, *The Doctrine of Res Judicata in Canada*, Third Ed. (Markham: LexisNexis Canada Inc., 2010) 9; *University's Response*, Tab 4L

28. Justice Beaudoin ruled that he was not in a position of reasonable apprehension of bias before he was provoked by Mr. Rancourt on July 24, 2012. Mr. Rancourt specifically raised that issue before Annis J. His “Notice of Motion for Leave to Appeal (Reasonable Apprehension of Bias)”, the originating process for the motion before Annis J., made that clear. Justice Annis held that Beaudoin J. was not in a position of reasonable apprehension of bias and denied Mr. Rancourt leave to appeal Beaudoin J.’s decision. In his 2013 Application to this Court seeking leave to appeal Justice Annis’ decision, Mr. Rancourt submitted that Justice Annis was wrong to find that there was no reasonable apprehension of bias. This Court dismissed that Application. He now seeks, again, to argue that Beaudoin J. was in a position of reasonable apprehension of bias. That issue is *res judicata*.

Notice of Motion to Annis J.; *University's Response*, Tab 3E

Mr. Rancourt’s Notice of Application for Leave to Appeal to the Supreme Court of Canada, dated January 4, 2013; *University's Response*, Tab 3F

Annis J.’s Bias Decision, paras. 40-44; *University's Response*, Tab 4S

2013 SCC Dismissal; *University's Response*, Tab 4H

29. There is an issue of whether this Court had jurisdiction to hear the Leave to Appeal Application from the Order of Annis J.

30. Because Beaudoin J.'s decision on the refusals motion was an interlocutory order, Mr. Rancourt sought leave from Annis J. to appeal that order to the Divisional Court, as he was required to do by s. 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

31. Subsection 40(1) of the *Supreme Court Act* provides that an appeal lies to this Court from a "final or other judgment ... of the highest court of final resort in a province". If there is a potential appeal route other than this Court for the unsuccessful litigant below, the judgment sought to be appealed is not from the "highest court of final resort".

Syndicat des employés de bureau de l'Hydro-Québec v. Procureur général de la province de Québec, [1973] S.C.R. 790 at 791; *University's Response*, Tab 4V

El v. Henry, [2011] S.C.C.A. No. 138; *University's Response*, Tab 4I

32. As the University submitted in this Court when Mr. Rancourt sought leave to appeal Annis J.'s Order in January 2013, an order of a Superior Court Judge denying leave to appeal the interlocutory order of another Superior Court judge is not a final order of the highest court of final resort in Ontario for litigants seeking to appeal an interlocutory order. The appropriate route to appeal that order is to seek leave to appeal to the Divisional Court from another judge of the Superior Court.

Mignacca v. Merck Frosst Canada Ltd., 2009 ONCA 393, 96 O.R. (3d) 164 at paras. 20, 21, and 23; *University's Response*, Tab 4M

Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce (1996), 29 O.R. (3d) 612 at para. 40 (C.A.); *University's Response*, Tab 4K

33. The Court of Appeal properly recognized, in this case, that the issue of a reasonable apprehension of bias was not open to challenge in that Court.

Notice of Appeal of Champerty Motion Decision to Court of Appeal for Ontario, April 12, 2013; *University's Response*; Tab 3F

Court of Appeal's Dismissal of the Champerty Appeal at para. 2; *University's Response*, Tab 4T

34. Instead of seeking, from another judge of the Superior Court, leave to appeal to the Divisional Court from Annis J.'s order, Mr. Rancourt appealed to this Court, where his Leave Application was dismissed. He decided to seek leave to appeal to this Court at that time, rather than seek leave to appeal to the Divisional Court from another judge of the Superior Court, despite having been advised of the appropriate remedy in a Dec. 11, 2012 letter from Ms. St. Lewis' lawyer. The effect of those decisions (of this Court and Mr. Rancourt) was that it is no longer open to him to question the correctness of Annis J.'s ruling that Beaudoin J. was not in position of reasonable apprehension of bias. Either he properly sought leave to appeal to this Court and the question was finally decided by the Order of this Court, or he decided to not seek leave to appeal to the Divisional Court from another judge of the Superior Court, and Annis J.'s decision stands. Either way, it was not open to him to resurrect his bias argument at the Court of Appeal in the appeal of the champerty motion decision, and it is not now open to him to challenge the Court of Appeal's decision in this Court on the basis that Annis J.'s decision was wrong.

B. The Proposed Appeal Raises no Question of National Importance

35. The University adopts and relies upon the submissions of Ms. St. Lewis.

1) The law of reasonable apprehension of bias is well established

36. This Court has clearly established, in a number of cases, that there is only one test to determine whether a judge is in a situation of reasonable apprehension of bias:

The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is "what would an informed person, viewing the matter realistically and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker] whether consciously or unconsciously would not decide fairly."

Committee for Justice and Liberty v. Canada (National Energy Board), *supra*, at p. 394; *University's Response*, Tab 4E

R. v. R.D.S., [1997] 3 S.C.R. 484 at para. 111; *University's Response*, Tab 4P

Wewaykum Indian Band v. Canada, 2003 SCC 45, [2003] 2 S.C.R. 259 at para. 60; *University's Response*, Tab 4W

2) There is no breach of Sections 7, 11(d) or 15 of the *Charter*

a) Section 7 does not apply to property rights and is not engaged

37. Section 7 does not apply to civil judgments or civil proceedings. The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 provides no guarantee of fair treatment by courts, tribunals or officials with power over purely economic interests of individuals or corporations.

Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Scarborough, Ont: Thomson Carswell, 2007) at 47-17; *University's Response*, Tab 4N

Calgary (City) v. Budge, (1991) 77 DLR (4th) 361 (Alta. CA), 1991 ABCA 3 (CanLII); *University's Response*, Tab 4C

38. Section 7 of the *Charter* does not apply to economic or property interests. As McLachlin, J.A. (as she then was) wrote in the British Columbia Court of Appeal decision of *Whitbread v. Walley*:

The plaintiff's case, reduced to its essence, is that the limitations of liability imposed by ss. 647 and 649 of the *Canada Shipping Act*, while on their face economic, are so directly connected to the physical and psychological liberty and security of his person that s. 7 of the *Charter* applies.

...[the plaintiff's argument] requires reading into s.7, after the declaration that a person has the right to 'life, liberty and security of the person' the additional phrase that he has the right to 'any benefit which may enhance life, liberty or security of person'. This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person which is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the *Charter* and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers.

Whitbread v. Walley, 1988 CanLII 2819 (BCCA) at paras. 42 and 46, appeal to SCC dismissed; *University's Response*, Tab 4X

39. In any event, Mr. Rancourt's champerty motion submissions do not engage his property rights. Even if he lost (as he did), his property rights were not engaged other than with respect to

costs and s. 7 does not shield one from the financial effects of the enforcement of a judgment. Mr. Rancourt's property rights will be put in issue at the libel trial, and that will be held in accordance with the principles of fundamental justice.

Beals v. Saldanha, 2003 SCC 72 at paras. 78; *University's Response*, Tab 4B

40. Furthermore, the champerty motion was held in accordance with the principles of fundamental justice, because there was no reasonable apprehension of bias.

b) Section 11(d) has no application to these proceedings

41. Section 11(d) of the *Charter* is not relevant as it is expressly limited to the criminal context. It has no application to civil proceedings.

Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 2 (Scarborough, Ont: Thomson Carswell, 2007) at 51-16; *University's Response*, Tab 4N

c) Section 15 is not relevant to these proceedings

42. Section 15 of the *Charter* requires that laws not discriminate on the grounds enumerated therein, or analogous thereto, in ways that perpetuate disadvantage or stereotyping. Mr. Rancourt makes no claim to such discriminatory treatment.

R. v. Kapp, [2008] 2 S.C.R. 438 at paras. 14 to 25; *University's Response*, Tab 4O

d) It is not appropriate to raise *Charter* arguments for the first time on appeal

43. This Court has held that it is inappropriate to raise *Charter* issues in the absence of an evidentiary record.

Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086; *University's Response*, Tab 4F

R. v. Sparrow, [1990] 1 S.C.R. 1075; *University's Response*, Tab 4Q

Caron v. Canada (Employment & Immigration Commission), [1991] 1 S.C.R. 48; *University's Response*, Tab 4D


PART IV – SUBMISSIONS IN RESPECT OF COSTS

44. It is submitted that costs should follow the event.

PART V – ORDER SOUGHT

45. It is submitted that this application for leave to appeal should be dismissed with costs.

DATED at the City of Ottawa, in the Province of Ontario on the 24 day of January, 2014.



BORDEN LADNER GERVAIS LLP
Peter K. Doody
Katherine Humphries
Counsel for the Respondent,
The University of Ottawa

PART VI – TABLE OF AUTHORITIES

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PART VII – STATUTORY AUTHORITIES

None.

TAB 3

TAB A

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOANNE ST. LEWIS

Plaintiff

and

DENIS RANCOURT

Defendant

NOTICE OF MOTION

The Defendant, Denis Rancourt, will make a motion to the court on March 29, 2012, at 10:00 a.m., or soon after that time as the motion can be heard, or at a date and time as set under case management if applicable, at the Ottawa Courthouse, 161 Elgin Street, Ottawa, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- ☐ in writing under subrule 37.12.1 (1);
- ☐ in writing as an opposed motion under subrule 37.12.1 (4);
- ☒ orally.

THE MOTION IS FOR:

1. An Order that the action be stayed or dismissed on the ground that the action is vexatious or is otherwise an abuse of process (Rule 21.01(3)(d) of the *Rules of Civil Procedure*).
2. The costs of this motion.
3. The Defendant's total costs in the action.
4. Such further and other relief as the Defendant may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. The Plaintiff is a tenured assistant professor in law at the University of Ottawa. The Plaintiff's counsel (a law firm partner) is a part-time professor in law at the University of Ottawa.
2. The Defendant is a tenured full professor in physics dismissed after 23 years by the University of Ottawa in 2009. The dismissal is presently in on-going binding labour arbitration between the University and the Defendant's union.
3. This defamation action, filed in June 2011, is about the Defendant's public criticisms 2008-2011 of the University of Ottawa on his long-standing "U of O Watch" blog, centrally including criticisms of the Plaintiff's work for the University. The action seeks defamation damages of \$1 million.
4. The Defendant denies that his criticism of the Plaintiff's work for the University was defamation at law (Statement of Defence) and takes the position that the action is champertous and improperly financed using public money.
5. The Court of Appeal for Ontario has defined maintenance and champerty (citing Halsbury) as:

“Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an [legitimate] interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.”

Buday v. Locator of Missing Heirs Inc., 1993 CanLII 961 (ON CA)

6. That an action should be stayed or dismissed as an abuse of process because it is based on a champertous agreement is established at law. When maintenance and champerty are demonstrated, the courts have ruled the remedy to be to stay or dismiss the action, including at the Court of Appeal for Ontario.
7. Following the Defendant’s request, the University of Ottawa stated in an October 25, 2011 letter to the Defendant that it is entirely funding the instant litigation.
8. The Plaintiff’s Statement of Claim (June 23, 2011) claims \$125 thousand in punitive damages to be paid to the University for a scholarship fund. Therefore, the University of Ottawa is receiving a share in the proceeds of the action which it is funding entirely.
9. The Plaintiff is refusing all discovery and to even discuss a discovery plan. (The Defendant provided an Affidavit of Documents early in the process.)
10. A need to examine the Plaintiff and witnesses for this motion (Rule 39.03) arises in part from the Plaintiff’s sustained refusal of any discovery (see above) and is necessary in order to ascertain:
 - (a) The funding agreement between the University and the Plaintiff;
 - (b) The source of the funding;
 - (c) The maintenance and champertous characteristics or circumstances of the funding;
 - and
 - (d) The motives for entering in the funding agreement for this action.
11. Rules 1.04(3), 2.01(1), 2.03, 3.02(1), 21.01(3)(d), 29.01, 30, 34.01(d), 34.02, 34.04(1), 34.04(4)-(5), 34.05-06, 34.08(1), 34.10, and 39.03 of the *Rules of Civil Procedure*.

12. Statutes *An Act respecting Champerty, R.S.O. 1897; Class Proceedings Act, 1992; Freedom of Information and Protection of Privacy Act, R.S.O. 1990*, and *University of Ottawa Act, 1965*.
13. Such further and other grounds as the Defendant may advise and this Honourable Court deems just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. An affidavit of the Defendant, sworn prior to serving the Motion Record, and the exhibits attached thereto.
2. Transcripts from the oral examinations for this motion (Rule 39.03) and documents produced on examinations for this motion (Rule 34.10), from witnesses:
 - Joanne St. Lewis, Plaintiff
 - Allan Rock, President of the University of Ottawa
 - Robert J. Giroux, Chair, Board of Governors, University of Ottawa
3. Such further and other evidence as the Defendant may advise and this Honourable Court may permit.

DATED: January 5, 2012

Denis Rancourt
Defendant

TO: Richard G. Dearden
Counsel for the Plaintiff
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

TAB B

COURT FILE NO.: 11-51657

DATE: February 8, 2012

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joanne St. Lewis v. Denis Rancourt

BEFORE: Mr. Justice Robert N. Beaudoin

Appearances:

Richard Deardon (by teleconference) and Anastasia Semenova: *for the Plaintiff*

Denis Rancourt: for himself

Peter Doody: for the University of Ottawa

Joseth Hickey: Observer

Hazel Gashoka: Observer

ENDORSEMENT (at Case Conference)

There are a number of issues for this conference:

1. The University of Ottawa seeks leave to intervene in the Defendant's motion to have a finding that the agreement between the Plaintiff and the University violates the rule against Champerty. No leave is required. As the University would be affected by this order, service of the Notice of Motion must be made on the University pursuant to Rule 37.07(1). It is implicit in that Rule the University has the right to file material in response to the Notice of Motion. Mr. Doody has accepted service of the Notice of Motion on behalf of the University.
2. The Defendant sought to postpone discoveries in the main action pending the results of the Champerty motion. Whether or not a court will conclude that the arrangements between Ms. St. Lewis offend the rule against Champerty, that does not dispose of the merits of her claim in defamation against Mr. Rancourt and I have concluded that discoveries on the main action should not be postponed pending the hearing of the Champerty Motion. If Mr. Rancourt should succeed in his Champerty Motion, he can claim any costs incurred of having to attend discovery.
3. The Defendant also expressed an intention to bring an "Open Court" Motion that would allow any member of the public or media to attend at any examinations for discovery. For this reason, he expressed the view that this motion should be heard before any cross-examinations or discoveries are scheduled or take place. This issue has been dealt with before. I conclude that this principle does not apply to out-of-court examinations and I adopt the reasoning of Master MacLeod in his order of October 6, 2011, which order has not been

appealed. There is no right for the public to attend an examination out-of-court at the office of the special examiner or court reporter.

4. As for the Champerty Motion itself, the following schedule applies:
 - a) the Plaintiff and the University will deliver their responding affidavits by February 21, 2011;
 - b) the Defendant will serve his Summons to a Witness, Robert Giroux, by February 13, 2012 for an examination to take place on March 5, 2012;
 - c) if the University agrees to the examination of Mr. Giroux, it will take place on March 12 or March 13, 2012, subject to Mr. Giroux' availability;
 - d) if the University does not agree with the proposed examination, it will serve its Motion to Quash the Summons no later than February 27, 2012 and the Motion will be heard on March 5, 2012 at a time to be arranged;
 - e) cross-examinations on affidavits will take place on March 27 and March 28, 2012. Ms. St. Lewis to be cross-examined first on March 27, 2012;
 - f) service of any documents on Mr. Rancourt in these proceedings can be made by e-mail and same day delivery of hard copies by courier at Mr. Rancourt's address;
 - g) a case conference will be held on April 2, 2012 at 9:00 a.m. to review compliance with this timetable, to schedule any motions arising out of the cross-examinations and the hearing of the motion.

5. ~~As for the defamation action, the following timetable applies:~~
 - a) Examinations for discovery will take place on April 30 and May 1, 2012 with examinations of Mr. Rancourt taking place on April 30th and those of Ms. St. Lewis taking place on May 1, 2012;
 - b) if Mr. Rancourt decides to bring a motion pursuant to Rule 30.06 for a better affidavit of documents or to cross-examine on the plaintiff's affidavit of documents, this is to be scheduled by him to be heard on April 3, 2012 at 10:00 a.m. He must serve his Notice of Motion in accordance with the Rules;
 - c) Mr. Rancourt is to provide copies of all documents referred to in his existing affidavit of documents by March 9, 2012. He is to provide an updated Affidavit of Documents and copies of those documents by April 16, 2012;
 - d) a case conference to review the status of the discoveries and to schedule the next steps will take place on May 4, 2012 at 9:00 a.m.
6. The plaintiff seeks costs "Thrown Away" for its attendance at the case conference before Master MacLeod on January 26, 2012 as well as for its response to the Defendants' request

for the translation of all documents and has filed written submissions in support of that request. Mr. Rancourt is to provide his written submissions in response by April 23, 2012 and the plaintiff will have a further 10 days from that date to provide her reply submissions.

7. The Plaintiff sought a ruling today on the issue of whether the French language interpretation should appear in the transcripts. This matter will be dealt with at the April 2, 2012 case conference.

"original signed"

Mr. Justice Robert N. Beaudoin

Date: February 8, 2012

NUMÉRO DE DOSSIER DU GREFFE : 11-51657

DATE : le 8 février 2012

COUR SUPÉRIEURE DE JUSTICE DE L'ONTARIO**AFFAIRE :** *Joanne St. Lewis c. Denis Rancourt***ENTENDUE PAR :** Le juge Robert N. Beaudoin**Représentations :**

Richard Deardon (par téléconférence) et Anastasia Semenova pour la demanderesse

Denis Rancourt : se représente lui-même

Peter Doody pour l'Université d'Ottawa

Joseth Hickey : observateur

Hazel Gashoka : observatrice

INSCRIPTION (conférence relative à la cause)

Plusieurs questions se posent dans le cadre de la présente conférence :

1. L'Université d'Ottawa demande l'autorisation d'intervenir dans la motion du défendeur, qui demande au tribunal de conclure que l'entente entre la demanderesse et l'Université viole la règle contre la champartie. Aucune autorisation n'est nécessaire. Étant donné qu'une telle ordonnance aurait des répercussions pour l'Université, l'Avis de motion doit être signifié à l'Université en vertu de la règle 37.07(1). Il est implicitement indiqué dans cette règle que l'Université a le droit de déposer des documents en réponse à l'Avis de motion. M. Doody a accepté l'Avis de motion au nom de l'Université.
2. Le défendeur demande que les interrogatoires préalables de l'action principale soient remis à une date ultérieure en attendant que l'issue de la motion liée à la champartie soit connue. Indépendamment de la conclusion de la motion liée à la champartie, il n'en demeure pas moins que Mme St. Lewis est en droit de présenter une demande en diffamation contre M. Rancourt. Par conséquent, j'ai conclu qu'il n'y avait pas lieu de remettre les interrogatoires préalables de l'action principale en attendant l'issue de la motion liée à la champartie. Dans l'éventualité où le jugement sur la motion liée à la champartie était favorable à M. Rancourt, ce dernier pourrait demander des dépens pour les frais relatifs à sa participation aux interrogatoires.
3. Le défendeur a également indiqué son intention de demander, au moyen d'une motion, que l'audience soit publique de façon à ce que tout membre du public et tout représentant des médias puisse assister aux interrogatoires préalables. Il demande donc que cette motion soit

entendue avant de fixer ou de tenir tout interrogatoire préalable et tout contre-interrogatoire. Cette question a déjà été tranchée et je conclus que le même principe ne s'applique pas aux interrogatoires hors la présence du tribunal. J'adopte le raisonnement que le protonotaire MacLeod a donné dans son ordonnance du 6 octobre 2011, laquelle n'a fait l'objet d'aucun appel. Le public n'a pas le droit d'assister à un interrogatoire hors la présence du tribunal se déroulant au bureau même de l'auditeur ou du sténographe judiciaire.

4. En ce qui a trait à la motion portant sur la champartie, les parties sont tenues de respecter le calendrier suivant :

- a) la demanderesse et l'Université doivent remettre leurs affidavits de réponse d'ici le 21 février 2012;
- b) le défendeur doit, d'ici le 13 février 2012, signifier au témoin Robert Giroux une assignation relativement à l'interrogatoire du 5 mars 2012;
- c) si l'Université consent à l'interrogatoire de M. Giroux, cet interrogatoire aura lieu le 12 ou le 13 mars 2012, selon les disponibilités de M. Giroux;
- d) dans l'éventualité où l'Université ne consentirait pas à l'interrogatoire, l'Université devra signifier à l'autre partie une motion en annulation de l'assignation au plus tard le 27 février 2012 et la motion sera alors entendue le 5 mars 2012 à l'heure qui aura été convenue;
- e) les contre-interrogatoires portant sur les affidavits auront lieu les 27 et 28 mars 2012, et Mme St. Lewis sera la première à être contre-interrogée le 27 mars 2012;
- f) tout document devant être signifié à M. Rancourt dans le cadre de la présente instance ~~peut être signifié par courriel, et les copies papier doivent être livrées par messenger le même jour à l'adresse de M. Rancourt;~~
- g) une conférence relative à la cause aura lieu le 2 avril 2012 à 9 h afin de veiller au respect du calendrier et de fixer la date de toute motion qui découlerait des contre-interrogatoires et de la motion.

5. En ce qui a trait à l'action en diffamation, les parties sont tenues de respecter le calendrier suivant :

- a) Les interrogatoires préalables auront lieu le 30 avril et le 1^{er} mai 2012; les interrogatoires de M. Rancourt se dérouleront le 30 avril et ceux de Mme St. Lewis, le 1^{er} mai 2012;
- b) si M. Rancourt souhaite présenter une motion en vertu de la règle 30.06 afin d'obtenir un meilleur affidavit de documents ou encore afin de contre-interroger la demanderesse sur l'affidavit de documents présenté par cette dernière, M. Rancourt devra prendre des arrangements afin que la motion soit entendue le 3 avril 2012 à 10 h. Il devra signifier son Avis de motion conformément aux Règles;
- c) M. Rancourt doit fournir une copie de tous les documents mentionnés dans son affidavit

de documents d'ici le 9 mars 2012. Il doit également fournir un affidavit de documents mis à jour accompagné d'une copie de ces documents d'ici le 16 avril 2012;

- d) une conférence relative à la cause aura lieu le 4 mai 2012 à 9 h afin d'établir où en sont rendus les interrogatoires et de prévoir les prochaines étapes.
6. La demanderesse demande que des dépens lui soient adjugés pour les frais « engagés inutilement » lorsqu'elle a participé à la conférence relative à la cause le 26 janvier 2012 devant le protonotaire MacLeod, ainsi que pour la réponse qu'elle a soumise suite à la demande du défendeur de faire traduire tous les documents. La demanderesse a déposé des représentations écrites pour appuyer sa demande de dépens. M. Rancourt doit à son tour soumettre ses représentations écrites d'ici le 23 avril 2012, après quoi la demanderesse disposera de 10 jours pour y répondre.
7. La demanderesse a demandé au tribunal aujourd'hui si l'interprétation en français devrait être jointe à la transcription et de rendre une décision à cet effet. Cette question sera abordée le 2 avril 2012 lors de la conférence relative à la cause.

“original signé”

Le juge Robert N. Beaudoin

Fait le 8 février 2012

TAB C

COUR SUPÉRIEURE DE JUSTICE
(DIVISION CIVILE)

E N T R E :

JOANNE ST. LEWIS

(Demanderesse)

E T

DENIS RANCOURT

(Défendeur)

M O T I O N

(INTENTÉE PAR LE DÉFENDEUR)

ENTENDUE DEVANT L'HONORABLE JUGE ROBERT N. BEAUDOIN
Mercredi, le 20 juin 2012 à Ottawa

(Tome I)

Comparutions:

R. Dearden

Avocat pour la défenderesse
(dans la motion)

D. Rancourt

Pour lui-même

P. Doody

Avocat pour l'Université d'Ottawa

Mr. Rancourt has written in his affidavit here, the credibility is close to zero in terms of what he's led the Court to believe in this affidavit and what in fact is the case, which is he knew about all this stuff seven weeks ago.

M. RANCOURT: Donc, je vais commencer par répondre à la plus récente suggestion, qu'il y a quelque chose qui n'est pas précis dans mon affidavit.

D'abord, j'ai vu aucun – les documents en question sont des documents qui sont en lien à un blog qui est en lien à mon blog, et je n'ai pas regardé ni ouvert ces liens....

LE TRIBUNAL: Pourquoi pas?

M. RANCOURT: Pardon?

LE TRIBUNAL: Pourquoi pas?

M. RANCOURT: Parce que j'avais pas ni le temps ni l'intérêt. J'avais pas de raison de penser que...

LE TRIBUNAL: Ah, non?

M. RANCOURT: ...c'était.... C'est-à-dire que j'ai – ce que j'ai fait....

LE TRIBUNAL: Pas d'intérêt.

M. RANCOURT: Pardon?

LE TRIBUNAL: Pas d'intérêt.

M. RANCOURT: Pas d'intérêt plus que, étant donné....

LE TRIBUNAL: Écoutez.

M. RANCOURT: Pas d'intérêt...

LE TRIBUNAL: Écoutez.

M. RANCOURT: ...pour ce cas précis.

LE TRIBUNAL: Je vais vous sauver énormément de problèmes, M. Rancourt. Votre demande de

contre-interroger M. Roussy, votre ajournement, est refusé.

5 Tout d'abord, il y a pas de contradiction du tout dans l'affidavit de M. Roussy. Il indique très clairement, précisément, qu'il répondait à votre demande au paragraphe 2. Il a fait la recherche et le document que vous citez, c'est pas un document qui est inclus dans la référence au paragraphe 2 de votre avis au témoin. Donc, il n'y a pas de contradiction. Il n'y a pas de demande de produire des documents supplémentaires dans cette motion. Je ne vois aucun motif pour remettre, ajourner cette motion du tout. Énormément de questions dont on a pu traiter s'il y a question – s'il va arriver à quelques reprises la question des documents, des motifs, nous allons en traiter, mais la question de refus, d'ajourner cette motion pour contre-
15 interroger Me Roussy, je la refuse parce qu'il n'y a aucune contradiction telle que vous prétendez.

20 Deuxièmement, je dois souligner que votre crédibilité même est compromise lorsque vous prétendez que vous venez tout juste à la dernière minute d'apprendre ces faits lorsqu'il est évident que vous auriez pu eu la chance, au moins, de prendre connaissance de ce document il y a longtemps.

25 **M. RANCOURT:** M. le Juge, permettez-moi de répondre à – à cette remise en question de ma crédibilité, s'il vous plaît.

30 Tout d'abord, la poste en question qui mettait pour la première fois ces documents en vue était le 30 avril. C'était après tous les contre-interrogatoires.

LE TRIBUNAL: On continue. On continue.
Continue. Vous avez pas la permission.

M. RANCOURT: Pardon?

LE TRIBUNAL: Demande est refusée.
L'ajournement est refusé. On continue.

M. RANCOURT: M. le Juge, je suis en train de répondre.

LE TRIBUNAL: J'ai donné ma décision.

M. RANCOURT: Oui, j'accepte, mais...

LE TRIBUNAL: Okay.

M. RANCOURT: ...est-ce que je peux répondre à cette question par rapport à ma crédibilité?

LE TRIBUNAL: C'est très clair.

M. RANCOURT: Non. Non, M. le Juge. Ce ne sont que les documents tels que vous les voyez, mais j'aimerais les expliquer, ces documents-là.

LE TRIBUNAL: Mais c'est assez pour soumettre vous auriez pu être au courant de ces documents il y a longtemps.

M. RANCOURT: Mais après les – tous les interrogatoires et....

LE TRIBUNAL: Mais pas le 18 juin, comme vous prétendez.

M. RANCOURT: Mais je n'étais pas au courant, M. le Juge. Je n'ai pas ouvert ce grand document avant qu'on me signale qu'il y avait quelque chose qui se rapportait à David Scott dans ce gros paquet de documents. Je – je n'avais pas....

LE TRIBUNAL: Mais vous voulez prétendre en même temps que Me Roussy a menti dans son affidavit. C'est pas vrai du tout. Donc vous accusez les autres de mensonges. Il est pertinent dans les circonstances à voir que vous-même, vous étiez au

– didn't – he passed up an opportunity to address that, and it's not in issue in the motion.

And finally, with respect to testing the question of privilege, whether a document is privileged is a question of law which the witness would be unable to answer, whether the documents in question are adequately described in paragraph five of Mr. Roussy's affidavit. In order to test them, he would necessarily have to inquire as to the contents of them, and revealing the contents would reveal the privileged information. So that the cross-examination would serve no purpose.

M. RANCOURT: Alors, par rapport à cette question que je n'ai pas posé des questions par rapport à la recherche, je pense que c'est un peu une fausse piste parce que la question est: j'ai soumis un Notice of Examination qui faisait des demandes précises et les règles sont telles que si les documents sont pertinents, ils doivent être rendus. Et c'est donc – c'est la recherche des documents pertinents qui était demandée dans cette notice que j'essaie de creuser. Et ça c'est à côté des questions que j'ai pu demander à M. Rock pendant son contre-examinatoire, mais j'ai signalé à M. Rock pendant le contre-examinatoire que je voulais les documents qui étaient demandés dans cette notice.

Donc ça – ça, je pense que c'est un à-côté. Voilà.

LE TRIBUNAL: Okay. Demande d'exclure l'affidavit de Me Roussy est rejetée. Il n'y a pas de demande ici dans votre motion pour des documents supplémentaires et il n'y a pas eu de demande lorsque vous avez contre-interrogé M. Rock par rapport

aux documents supplémentaires. La question de recherche, vis-à-vis l'occasion de poser la question à ce moment-là, vous ne l'avez pas fait. S'il y a lieu des questions de privilège entre le client et son avocat, ce serait à Me Roussy à me soumettre les documents et à ce moment-là j'aurais vérifié, voir que si cette demande est soutenue.

Donc on procède.

M. RANCOURT: Oui.

Le prochain point.... Je me pose la question si je dois adresser la question des questions que je demande à être radiées dans un des interrogatoires avant de me lancer dans les refus. Alors on risque.... Bon, je pense que je vais – je vais garder ça pour plus tard. Je vais me lancer dans la question des refus donc.

LE TRIBUNAL: Donc on commence avec les refus de qui?

M. RANCOURT: Okay.

MR. DEARDEN: Your Honour, are we now going into the refusals charts?

THE COURT: I think he was asking himself whether or not he wants to strike answers. I'm not aware of any....

MR. DEARDEN: He's trying.... I think he's referring to he wants to strike answers, answers to questions given to me in re-examination by Dean Feldthusen.

THE COURT: Right.

MR. DEARDEN: But what I was going to ask in terms of how we proceed now with the 145 questions that are in issue in refusals is – can I make a

questionner la réponse qui vient d'être donnée. On peut – et une façon de questionner la réponse qui vient d'être donnée, c'est de la reposer d'une autre façon. C'est ce que j'ai fait. Et la deuxième réponse était, "Je ne sais pas." Alors en premier, on donne une réponse; ensuite, on dit, "Je ne sais pas"; et ensuite l'avocat dans sa lettre dit, "De toute façon, c'est pas pertinent."

C'est dans ce sens-là que je veux avoir le droit d'aller au fond de cette question-là. C'est tout.

LE TRIBUNAL: Okay.

MR. DOODY: I didn't say it wasn't pertinent.

LE TRIBUNAL: C'est pas pertinent.

MR. DOODY: Sorry.

LE TRIBUNAL: C'est pas pertinent. Ben, de l'avoir – c'est pas pertinent, mais il a répondu.

M. RANCOURT: Pardon?

LE TRIBUNAL: Une réponse – il y a eu une réponse à la question 11.

M. RANCOURT: Onze?

LE TRIBUNAL: Numéro 5. Il y a eu une réponse qu'il y avait pas de politique.

M. RANCOURT: Oui. Et donc si on passe au 3.

LE TRIBUNAL: Ça se parle d'une – d'assurance, question différente. Il répond, "Je ne sais pas."

M. RANCOURT: Attendez. Ça c'est un groupe de questions.

LE TRIBUNAL: La question différente.

M. RANCOURT: Oui. Si on passe.... Oui. Donc, la question 2 était par rapport à si l'employé est poursuivi.

LE TRIBUNAL: Mm-mmm.

"Mr. Giroux, could you find out if there are any such policies or procedures or directives relating to this?"

"Don't answer. The answer is 'No.'"

5

Donc il a refusé.

M. RANCOURT: Oui.

LE TRIBUNAL: Ça c'est la question.

M. RANCOURT: D'accord.

LE TRIBUNAL: Pis là, la réponse, Me Doody:

10

"A witness being examined on a motion is not required to give undertakings. He is akin to a witness at trial, who is not required to give undertakings. In any event, the Summons to Witness asked for such policy in item 2 set out above.

15

Mr. Rancourt was advised in the letter from the University's lawyer, attached as exhibit 'C' to Mr. Rancourt's affidavit of June 12 that there is no such policy.

20

Mr. Rock testified that he was not aware of such a policy. Nothing is to be gained by having Mr. Giroux asked the same question again and passing on the same answer."

Donc, vous avez leur réponse.

25

M. RANCOURT: Mais je pense que j'ai le droit d'interroger mes témoins et d'avoir -- de poser la même question à différents témoins, même si un a déjà répondu. C'est tout.

LE TRIBUNAL: Okay, bon. La question est répondue.

30

M. RANCOURT: J'ai posé la question à savoir quel était le budget pour les frais légaux à l'Université, quel était la quantité du budget spécifiquement. On a dit que c'était pas pertinent.

Ça parle du motif, à mon sens. Si on est en train d'utiliser plus que le budget habituel, ça montre un grand désir de faire cette chose. C'est donc relié aux motifs.

THE COURT: Mr. Doody, on the budget?

M. RANCOURT: Dans le...

Est-ce qu'on va faire chaque question une à une...

LE TRIBUNAL: Oui, oui.

M. RANCOURT: ...comme ça?

LE TRIBUNAL: Oui, oui.

M. RANCOURT: Oui?

LE TRIBUNAL: C'est la façon de procéder. We're going to go one by one.

MR. DOODY: Your Honour, the question was:

"What would typically be the annual legal budget of the University for outside counsel services?"

In my respectful submission, that can be of no relevance. What the University budget is in a typical year, I have no idea how that could be relevant to their motivation in this particular case.

LE TRIBUNAL: Je suis d'accord. C'est pas pertinent.

M. RANCOURT: Si on passe d'ici à numéro 5. Il a été démontré dans l'examination que le témoin n'a pas cherché ses propres courriels pour répondre aux demandes dans le Summons to Witness. Et donc je demande que le témoin cherche ses propres courriels pour tout courriel qui pourrait être pertinent à cette motion.

En gros, c'est comme ça qu'on peut résumer toute cette série de questions. Il a été clairement établi

answer questions; and that was not sought in the Summons to Witness.

M. RANCOURT: Je soumets que il a été découvert pendant cette examination que le témoin n'a pas cherché ses propres courriels. Donc je demande que le témoin cherche ses propres courriels pour tout document qui serait pertinent à cette motion.

THE COURT: Okay. So he wants the witness to look for e-mails that are relevant to this motion. And your answer to that?

MR. DOODY: a) The witness is not required to give undertakings. b) It's far too broad of a question. c) That wasn't what he asked him.

Under the cross-examination, he asked for – to search for communications, e-mail communications, for the period between April and October 2011 about the meeting that took place in October.

M. RANCOURT: Le témoin avait une responsabilité de répondre au Summons to Witness, qui est très sérieuse, et n'a même pas recherché les documents dans son contrôle, dans son adresse de courriel, pour voir s'il y avait pas des communications ou des documents attachés qui pouvaient être pertinents à cette motion.

LE TRIBUNAL: Okay.

M. RANCOURT: Et donc je demande que le témoin fasse cela.

LE TRIBUNAL: La demande pour tous les documents n'était pas si précise. Un témoin n'est pas – dans les circonstances de M. Giroux – n'est pas tenu à faire des engagements; et lorsque la pertinence de la question – elle a pu être précisée en vue des communications d'une période précise. Elle a

été répondue, qu'il a eu une communication par téléphone.

Donc, il n'y a aucune obligation de la part de M. Giroux d'aller fouiller dans ses courriels.

M. RANCOURT: Le numéro 6 est rattaché au numéro 5 dans le sens que M. Doody avait contemplé la possibilité que l'Université ferait une recherche pour les courriels en question, puisque c'était des échanges entre M. Giroux et l'Université. J'imagine que la réponse va être la même, mais je fais la demande.

LE TRIBUNAL: On parle....

M. RANCOURT: Donc ça aurait été des courriels d'échange entre Diane Davidson à l'Université d'Ottawa, qui est la Vice-présidente pour la gouvernance, et Mr. Giroux, qui est le Chef du Bureau des gouverneurs, qui se reliaient à ce meeting où la décision a été prise – donc qui seraient, d'après moi, directement pertinents à la motion. Et donc je demande que l'Université fasse une recherche entre avril 2011 et octobre 2011 pour de tels courriels.

MR. DOODY: Your Honour, the same response as the previous one, with one twist. In fact I did search – I did have a search conducted of Ms. Davidson's e-mail records for the two-week period prior to the October 11 meeting to see if there were any e-mails between her and Mr. Giroux in that time period and no such e-mails were located and Mr. Rancourt's been advised of that. With respect to the balance, my submissions are the same as with respect to the earlier request.

LE TRIBUNAL: Non, c'est – ça c'est vraiment la – ce qu'on dit en anglais "fishing expedition."

M. RANCOURT: Le point 7, M. le Juge, c'est pour obtenir l'agenda du meeting de l'exécutif du Bureau des gouverneurs qui permettrait de savoir qui était présent à ce meeting-là. C'est une information qui serait très facile à obtenir et à me fournir. Donc je la demande.

THE COURT: Okay. Mr. Doody?

MR. DOODY: Your answer.... Sorry. Your Honour, the witness gave evidence as to who – who he could recall was at the meeting. There then was a request for an undertaking to search the records to find out who else was there and the response was that the witness is not required to give undertakings. In addition, I would submit that it's not relevant to the issues.

LE TRIBUNAL: Comment c'est pertinent?

M. RANCOURT: C'est pertinent parce que c'est le corps décisionnel le plus élevé qui a eu l'occasion de se prononcer sur cette – ce financement de cette action et donc savoir qui était présent, qui a pu avoir une influence, ça me semble tout à fait pertinent.

LE TRIBUNAL: Okay. C'est pas pertinent. Not relevant.

"Witness's reaction and position regarding University sharing in the proceeds of the action"?

M. RANCOURT: Alors pour expliquer cet item, M. le Juge, le Chef du Bureau des gouverneurs a appris pour la première fois pendant l'examination

ue l'Université pourrait recevoir une part des
bénéfices de cette action. Il n'était pas au courant
— on ne l'avait pas mis au courant. Et donc il a été
un peu, je dirais, surpris. Et donc je lui ai demandé
quelle est cette réaction, à apprendre cette — cette
chose-là, et:

"Est-ce que vous croyez qu'il y a un conflit
avec les politiques, par exemple, de
l'Université, etc.?"

Dans des termes larges, j'ai posé ce genre des ques-
tions. Et on a refusé. Il dit que c'était pas
pertinent.

LE TRIBUNAL: Et pourquoi c'est pertinent?

M. RANCOURT: C'est pertinent parce que si
cette situation est contraire aux politiques, ça parle
directement d'un motif impropre.

LE TRIBUNAL: Il a déjà répondu qu'il n'y a pas
de politique.

M. RANCOURT: C'est-à-dire que il a répondu
pour les politiques de financement, mais il a pas
répondu par rapport à la possibilité qu'on pourrait
avoir ce qu'on peut appeler dans le langage commun
"une ristourne." Donc il a été — il a été...

LE TRIBUNAL: Mais la réaction de M. Giroux,
c'est pertinent à quoi?

M. RANCOURT: Oui, parce que M. Giroux
représente l'institution. Mr. Giroux représente
l'autorité, le bien-porté de l'institution; et donc, ça
me semble directement pertinent.

LE TRIBUNAL: Okay. C'est pas pertinent.

"Expected costs of litigation"

Comment c'est pertinent?

LE TRIBUNAL: Oui. Ça s'applique pas du tout. C'est pas même en considération. Pis McIntyre, c'est encore question de "contingency fees."

M. RANCOURT: Oui, c'est vrai.

LE TRIBUNAL: L'analyse est complètement différente.

M. RANCOURT: Ça me semble important. Par exemple, le M. Doody a suggéré -- je m'objecte à ça, que je pose cette question-là pour des raisons malfaisantes. Pourquoi est-ce que ce chiffre serait embarrassant d'aucune façon que ce soit? Donc il me semble que même juste de suggérer ça démontre la pertinence de ce chiffre.

LE TRIBUNAL: Okay. C'est pas pertinent.

M. RANCOURT: Le numéro 10 -- pourquoi est-ce que ce cas est important à l'Université? En quoi est-ce que c'est important? Pourquoi est-ce que ça préoccupe l'Université?

Je demande au Chef du Bureau des gouverneurs. Il me semble que ça parle directement par rapport aux motifs. Donc ça me semble pertinent.

LE TRIBUNAL: Mais la question est -- est-ce que vous acceptez que effectivement que la question est telle que proposée -- telle qu'indiquée par Me Doody?

"At the time of the October 19th meeting, did you feel what the president was informing you about regarding this lawsuit was an important matter, Mr. Giroux? Without speculating, in your position you are asked continuously to distinguish between important matters and less important matters and not important matters. It is an important decision-making capacity in important

matters. In part because of this, the media – is the other reason why this – this is important." [as read]

5
M. RANCOURT: Est-ce que vous m'avez posé une question?

LE TRIBUNAL: Non, non, mais c'est tel que reproduit par Me Doody.

M. RANCOURT: Oui.

LE TRIBUNAL: Okay?

10
M. RANCOURT: Oui. Donc moi....

LE TRIBUNAL: Et c'est pertinent pourquoi?

M. RANCOURT: Pardon?

LE TRIBUNAL: Pourquoi c'est pertinent?

M. RANCOURT: C'est pertinent de savoir....

15
LE TRIBUNAL: Qu'est-ce que M. Giroux pense – si c'est important.

M. RANCOURT: Sa position, en tant que représentant d'une institution, à savoir pourquoi ce cas est important pour l'Université, je pense est très pertinent.

20
LE TRIBUNAL: Mais la décision....

M. RANCOURT: Je l'ai....

LE TRIBUNAL: C'est la décision – la décision – la demande a été faite par le Président.

25
M. RANCOURT: Ben c'est-à-dire c'est une institution et le Bureau des gouverneurs est l'autorité au-dessus du Président qui représente vraiment la corporation.

THE COURT: Okay. Not relevant. Doesn't have....

30
M. RANCOURT: Pardon?

LE TRIBUNAL: Pas pertinent.

M. RANCOURT: Alors il y a la question du cap. C'est relié à la quantité; c'est relié à la nature de l'entente; et la nature de l'entente parle directement des motifs. C'est la question 11.

LE TRIBUNAL: Non. Ça – pas pertinent.

M. RANCOURT: Je veux signaler à la Cour au numéro 12 que quand je mets des questions en parenthèses, c'est simplement pour donner un background à titre d'information. Ce n'est pas une question comme telle à laquelle je cherche une réponse. Quand je mets en parenthèses comme ça, c'était pour donner la question précédente – pour donner le contexte de la question plus courte.

Alors je cherchais à connaître l'impact financier de cette décision, et je cherchais à avoir une réponse par rapport à ça.

LE TRIBUNAL: Okay. Mais encore la pertinence – question de la motion de champartie?

M. RANCOURT: La pertinence, c'est que si il y a un impact négatif important et que malgré ça on l'a fait, ça parle des motifs.

LE TRIBUNAL: Oui.

M. RANCOURT: Si l'institution s'est rattaché aussi à la question d'importance, si c'est important pour des mauvaises raisons et on est prêt à faire des sacrifices exceptionnels, ça informe le motif de l'institution pour faire ça.

LE TRIBUNAL: Okay – non. Pure spéculation de votre part. C'est pas pertinent.

M. RANCOURT: Dans la question 13, je demande s'il y a une politique universitaire qui limite les dépenses de discrétion du président et on

And the reason is that the witness is not required to give an undertaking, and in any event, it's not relevant. There's not been an allegation that Mr. Rock exceeded his authority and I know of no basis to suggest that. My friend here – Mr. Rancourt is fishing.

THE COURT: Okay, right. C'est pas pertinent.

M. RANCOURT:

"Est-ce qu'il y a un élément, une quantité de dépenses qui pouvait enchaîner un contrôle quelconque pour autoriser les dépenses? "

Ça c'était la question 14. Je pense que la réponse – la logique va être la même.

LE TRIBUNAL: Oui. C'est pas pertinent.

M. RANCOURT: La question 15 se réfère directement à l'évidence que j'ai de motif impropre – très sérieux – où l'Université a pratiqué une surveillance sournoise de moi et de d'étudiant et de d'autres employés de l'Université. Et donc pour illustrer à quel point jusqu'où ça peut aller et à quel point c'est grave, j'aimerais porter votre attention aux exhibits "Y," "Z" et jusqu'à "AF" dans le volume deux de mon Dossier de motion. Alors si on commence à "Y",....

On voit que la personne.... Donc tous ces....

D'abord on peut commencer avec l'affidavit lui-même parce que tous ces exhibits-là sont reliés à l'affidavit pour la motion des refus actuelle et cet affidavit donc, c'est le – c'est les paragraphes....

Je cherche dans l'affidavit où je fais appel à ça. Donnez-moi une seconde. Voilà.

LE TRIBUNAL: En 2007, vous écrivez à l'Université pour avoir des copies.

M. RANCOURT: Oui. Je suis au courant, mais les documents qui ont été libérés...

LE TRIBUNAL: Non, non.

M. RANCOURT: ...sont ceux-ci.

LE TRIBUNAL: Mais vous êtes – vous étiez au courant depuis longtemps.

M. RANCOURT: Oui. Oui.

LE TRIBUNAL: Qu'on faisait une surveillance.

M. RANCOURT: Oui, j'étais au courant. Et je pense que la nature de cette surveillance est tellement énorme que ça montre à quel point l'institution – je parle de l'identité corporative – peut avoir des motifs impropres...

LE TRIBUNAL: Encore....

M. RANCOURT: ...à l'égard d'un individu.

LE TRIBUNAL: On retourne toujours. C'est pas un motif vous avez précisé dans votre Avis de motion, ni dans votre affidavit.

M. RANCOURT: C'est un motif. Donc mes questions se rattachent à ce thème de ces actions énormes de l'Université par rapport à son comportement corporatif. Donc toutes les questions à partir de – où est-ce qu'on est rendu là? – dans l'item 16 – toutes les....

LE TRIBUNAL: Non.

M. RANCOURT: Ce sont...

LE TRIBUNAL: C'est pas pertinent.

M. RANCOURT: ...des questions par rapport à la surveillance.

LE TRIBUNAL: C'est pas pertinent.

M. RANCOURT: Ensuite, par rapport à l'item 17, je demande.... Dix-sept et 18 sont reliés.

C'est des questions par rapport à l'utilisation des informations personnelles médicales des employés sans la connaissance de l'employé, à savoir si c'est une pratique acceptable ou pas – parce qu'il y a des évidences qui sont sorties qu'il y a eu une telle pratique à mon égard. Et donc, étant donné cette divulgation récente, j'ai voulu questionner sur ça. Et, évidemment, j'ai vu certains documents, qui restent à protéger, sous "implied undertaking." Donc, personnellement, je suis motivé par ça, mais je ne peux pas divulguer la nature de ces documents, mais mes questions étaient pour aller chercher à quel point c'est de l'évidence d'une motivation impropre, cette pratique par rapport à l'information médicale, et à faire des évaluations – psychiatrique, par exemple – sans le consentement et sans la connaissance du professeur.

THE COURT: Okay. Mr. Doody? It's not part of – ça fait pas partie des allégations des motifs impropres de l'Université.

M. RANCOURT: Et ça, je dois dire ça aurait été impossible que ça fasse partie, parce que je n'ai découvert ça que grâce à l'arbitrage.

MR. DOODY: Well, with respect....

M. RANCOURT: D'ailleurs....

MR. DOODY: With respect....

M. RANCOURT: La – la – le document....

LE TRIBUNAL: Attendez un instant, okay?

M. RANCOURT: Pardon?

MR. DOODY: If I'm being asked to respond to that, in my submission, if he was unaware of it, he could have.... Well, let me just say this: I don't

mon onglet "B" dans le – "2B." Et dans cette demande, évidemment je demande des documents qui sont pertinents et on a un désaccord par rapport à qu'est-ce qui est pertinent et ce qui ne l'est pas. Mais le but de cette notice était de demander tous les documents pertinents dans les catégories qui suivent ici. Et je suis d'accord avec M. Doody pour sacrifier, et aussi parce que je suis d'accord, que les communications privilégiées entre BLG, Université d'Ottawa, ne sont privilégiées. Ce que je voulais dire quand j'ai posé ça, c'était si BLG représentait la plaignante à ce moment-là, je voudrais – et que l'Université a été impliqué, et donc il y aurait une tierce personne, ça serait pas privilégié. Si c'est le cas, je veux aussi ces documents-là. C'est ce que je voulais dire. Et donc – donc, je précise ça.

Mais en gros, cette notice était pour demander les documents dans les catégories qui sont décrites ici qui seraient pertinents.

Et je pense qu'on a déjà décidé de la non-pertinence de la catégorie entière en répondant aux questions, si je me trompe pas, M. le Juge.

LE TRIBUNAL: Oui.

M. RANCOURT: Donc toutes ces catégories-là seraient éliminées.

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: Et donc, en grande partie, je pense qu'on a déjà...

LE TRIBUNAL: Terminé, okay.

M. RANCOURT: ...terminé, excepté pour la question des courriels, que maintenant on sait que

LE TRIBUNAL: Okay – refusé. Dans cette – purement question de crédibilité, il a répondu à la question.

M. RANCOURT: Donc maintenant on peut passer au prochain témoin. Et comme j'ai expliqué, il y a plusieurs questions que je vais pouvoir éliminer, étant donné les décisions qui ont été prises à date.

On passe. Le deuxième témoin était M. Allan Rock, et c'est dans l'onglet 5...

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: ...de mon Dossier de motion, si je me trompe pas.

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: Oui, c'est ça. Et donc c'est le Tableau des Refus, l'onglet 5.

Alors, je vais abandonner l'item 1, 2, 3, 4, 5, 6, 7....

MR. DOODY: Hold on.

LE TRIBUNAL: Un, 2....

M. RANCOURT: Trois, 4, 5, 6, 7. J'abandonne ces items entiers dans mon tableau parce que c'est des questions très semblables aux questions qui avait été posées à M. Giroux et les décisions de pertinence ont déjà été prises par la Cour. Donc, j'élimine ces questions-là, si je peux.

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: Donc j'élimine aussi la question 8. Je ne suis pas d'accord que tous ces questions ne sont pas pertinentes, évidemment. J'ai déjà exprimé mes objections, dit mon interprétation, mais je les élimine parce que la décision a déjà été prise.

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: Et donc j'élimine aussi le 9.

MR. DEARDEN: Sorry, did you drop 8 as well?

MR. DOODY: Yes, he did.

M. RANCOURT: Oui. Tout jusqu'à 9 a été éliminé jusqu'à date.

LE TRIBUNAL: Il faut faire une correspondance entre....

M. RANCOURT: Et j'élimine aussi le 10.

Donc on est rendu à l'item 11 dans le Tableau des refus pour M. Allan Rock. Et j'aimerais, avant d'adresser cet item 11, j'aimerais faire une soumission, qui est la suivante.

M. Doody a proposé que ce que M. Rock faisait, c'était à donner un....

LE TRIBUNAL: Attendez. J'ai votre cahier de motion. J'ai ce que M. Doody a préparé.

I'm trying to correlate between these two. I have – you produced "Refusals and Undertakings Chart."

MR. DOODY: Well, the two – the two.... If I can assist, Your Honour, the two charts – my chart in the typing that's not in italics is copied verbatim from Mr. Rancourt's chart. So we re-created Mr. Rancourt's chart in Word format,...

THE COURT: All right. Okay.

MR. DOODY: ...in electronic.

THE COURT: So.... I know. But you...

MR. DOODY: Then the italics...

THE COURT: ...have a first part...

MR. DOODY: ...from mine....

THE COURT: ...from the Notice of Examination. It's the second part of the actual questions. Okay, I've got it now.

un affidavit à l'appui. Les parties adverses ont répondu. Il y a des interrogatoires. Là, vous complètement changez l'enjeu, élargi votre théorie en plein milieu de l'argumentation. C'est injuste.

MR. DEARDEN: Your Honour, also not unfair – or also unfair, rather – is, I believe – and correct me if I'm wrong, Mr. Rancourt – but the document you just referred to at page 254 of your Record, is this not one of the documents that you have to seek leave of Justice Beaudoin to introduce in the champerty motion, which is a motion which is supposed to be brought on August 29th? He doesn't have....

This is post his cross-examination affidavit that he told us sometime recently, Justice Beaudoin, that breaking news coming to the May 14th arbitration hearing was that Sean McGee was going to be filing some bad faith evidence and he wanted to put in another affidavit, and that was the affidavit that he needs leave to put – or to get the evidence in, and now he's stuck it in his refusals motion.

Right? This is.... This is....

M. RANCOURT: Oui.

MR. DEARDEN: Yeah, okay. Okay.

M. RANCOURT: Tout à fait. Possiblement. Je n'ai pas vérifié si cette.... C'est – c'est possible. Je n'ai pas – cette question-là, j'ai pas fait la vérification précise, mais je crois que ce document est pertinent à cette motion pour les refus. C'est pour ça que je l'inclus maintenant. J'ai maintenant accès à ce document et je crois qu'il est pertinent pour cette motion de refus.

J'aimerais signaler un autre document parce que ce document relie de...

MR. DEARDEN: Just so I'm clear on....

M. RANCOURT: ...- de des....

MR. DEARDEN: Mr. Rancourt, just so I'm clear on the record, I'm saying you can't do that. You can't do that.

THE COURT: No.

MR. DEARDEN: 'Cause you haven't got leave yet to have this in this motion.

LE TRIBUNAL: Pas la permission de la Cour de faire référence des documents additionnels.

M. RANCOURT: Dans la motion principale, M. le Juge, mais nous sommes dans....

LE TRIBUNAL: Non, aujourd'hui - mais vous ne pouvez pas éviter ça en les introduisant ici aujourd'hui.

M. RANCOURT: Mais ils ne sont pas encore admissible dans la motion principale. Ils sont ici pour....

LE TRIBUNAL: Alors pourquoi je devrais les traiter maintenant?

M. RANCOURT: Parce que...

LE TRIBUNAL: Pourquoi...

M. RANCOURT: ...ils sont pertinents....

LE TRIBUNAL: ...ils seraient admissibles maintenant?

M. RANCOURT: Parce qu'ils sont pertinents à la question...

LE TRIBUNAL: On n'a pas...

M. RANCOURT: ...des refus.

LE TRIBUNAL: ...décidé l'admissibilité de ces documents-là.

M. RANCOURT: Dans la motion principale,...

LE TRIBUNAL: Oui.

M. RANCOURT: ...on n'a pas décidé.

LE TRIBUNAL: Alors pourquoi ils seraient admissibles maintenant?

M. RANCOURT: Parce qu'ils sont pertinents à la motion pour les refus, M. le Juge.

LE TRIBUNAL: Non. Élargir toujours votre Avis de motion avec les documents vous n'avez pas eu la permission de déposer.

M. RANCOURT: Je.... Je.... En les introduisant ici, je ne les introduis pas dans la motion principale. Je....

LE TRIBUNAL: Mais vous voulez mettre en preuve. Ça fait la même chose.

M. RANCOURT: Ils peuvent être exclus si la décision....

LE TRIBUNAL: Mais non. Je peux pas me fier sur un document sur lequel on n'a pas encore tranché la question d'admissibilité.

M. RANCOURT: Mmm. Je pense que le document – je crois que le document "W" n'est pas un de ces documents-là, mais plutôt un autre. Je sais pas – je ne sais pas s'il est dans cette catégorie-là ou pas, mais je trouvais qu'il est important pour les refus parce qu'il relie M. Bruce Feldthusen, qui est un des...

MR. DEARDEN: Yes, it is.

M. RANCOURT: ...un des déposants.

MR. DEARDEN: It's subject to the leave application...

M. RANCOURT: Oui?

MR. DEARDEN: ...as well.

M. RANCOURT: Okay. Mais dans – ce document relie M. Rock et M. Feldthusen par rapport à moi. Alors une des personnes dans la motion principale....

LE TRIBUNAL: Je répète encore,...

M. RANCOURT: D'accord.

LE TRIBUNAL: ...M. Rancourt,...

M. RANCOURT: D'accord.

LE TRIBUNAL: ...vous n'avez pas dans votre Avis de motion plaidé que ça fait partie d'une campagne de la part de l'Université de débarrasser de vous. Vous avez plaidé spécifiquement que c'est une motion – la poursuite de Me St. Lewis contre...

M. RANCOURT: Monsieur....

LE TRIBUNAL: ...vous devrait être suspendue parce qu'il y a une entente entre l'Université et Me St. Lewis qui – contre la loi contre la champartie. Vous avez précisé que, premièrement, il y a eu une entente de rembourser les frais, et qu'il y a une partage des sommes, une promesse de la part de Me St. Lewis de partager les sommes qu'elle peut retrouver si elle fait une poursuite contre vous, et que, finalement, les motifs de l'Université en s'appuyant – en – rentré dans cette entente avec Me St. Lewis pour payer ses frais – que l'Université voulait utiliser le fait de cette poursuite dans l'arbitrage contre vous.

Vous n'avez pas plaidé cette campagne, cette théorie que l'Université a depuis longtemps cette campagne de débarrasser de vous, et que ça fait tout un petit morceau de toute cette campagne. Ça c'est une belle théorie que vous lancez aujourd'hui pour la première fois.

M. RANCOURT: Et je crois, M. le Juge, que cette théorie est la vérité et c'est la seule occasion, dans cette motion....

LE TRIBUNAL: Et moi je vais vous dire – je répète encore – c'est pas – que vous avez plaidé. On traite uniquement aujourd'hui d'une motion de refus à des questions qui ont été posées dans le cadre d'un Avis de motion et un affidavit vous l'apportez – étaient beaucoup plus diminués que vous prétendez aujourd'hui.

M. RANCOURT: Donc, M. le Juge, si je comprends bien, vous dites que toutes les questions que je viens de lire par rapport aux motifs de M. Rock, vous les juges non-pertinentes?

LE TRIBUNAL: Non-pertinentes.

M. RANCOURT: D'accord. Alors je peux passer maintenant à l'examen de Mme St. Lewis.

LE TRIBUNAL: Est-ce qu'il y a pas d'autres questions par rapport à M. Rock?

M. RANCOURT: Non. C'était....

LE TRIBUNAL: Et on devrait passer à Mme Delorme – parce que Me Doody ne peut pas venir ici – parce que Me Doody ne peut pas venir le 24 juillet. Il n'est pas disponible.

M. RANCOURT: J'espère qu'on va pouvoir finir aujourd'hui. C'est mon but. Est-ce que vous dites que le 24 c'est une date pour continuer?

LE TRIBUNAL: Ça c'est – le 24 – pour les refus des interrogatoires au préalable.

M. RANCOURT: Ah, oui. Donc on pourrait d'abord finir cette motion?

LE TRIBUNAL: Oui, mais je voulais – Me Dearden est disponible, mais non pas...

M. RANCOURT: Ah, d'accord.

LE TRIBUNAL: ...Me Doody. Donc il faudrait procéder....

M. RANCOURT: Okay. Donc je peux – je peux, de façon très courte, résumer la situation avec....

LE TRIBUNAL: Non. Vous abandonnez 12 et 13? Parce que c'était refusé.

M. RANCOURT: Oui. Parce que ça avait été refusé avant.

LE TRIBUNAL: À la part de M. Giroux. Okay.

M. RANCOURT: Exactement.

LE TRIBUNAL: Okay.

M. RANCOURT: Donc je les abandonne pas, mais y en déjà – les décisions ont déjà été prises.

LE TRIBUNAL: Oui, oui.

M. RANCOURT: Donc je peux rapidement, dans l'effort de sauver du temps à la Cour et à tout le monde, résumer la situation avec Mme Céline Delorme. Alors voici, et je pense que c'est relativement simple.

Mme Delorme a soumis un affidavit dans lequel elle a inclu deux exhibits. Dans l'exhibit "A," c'était une espèce d'énoncer introduction – document – accompany – qui accompagnait les – les commentaires d'ouverture de l'Université dans le Tribunal par rapport au travail. Ce document – j'ai toute raison de croire, avec document à l'appui, qu'il y a des erreurs dans ce document et que les avocats de l'Université savaient que ces choses étaient en erreur. Il y a même un document qui montre, que j'ai ici, que l'avocat de l'Université en chef, M. Harnden, a dit, effectivement – "Je vais corriger mon erreur à l'arbitre par rapport au contenu de ce document. "

crédibilité de la dépositante par rapport à un document qu'elle a mis devant la Cour dans cette motion.

LE TRIBUNAL: Non, mais les faits pertinents du document qu'elle a déposé devant la Cour, qui traite uniquement de ces propos que l'Université aurait dit, la poursuite, les faits qu'y en trouve la poursuite de Me St. Lewis contre vous sont tels qu'ils sont énoncés aux pages 12 et 13. Donc il y a pas de contradiction.

M. RANCOURT: Oui.

M. RANCOURT: M. le Juge, je demande simplement qu'on me permet de tester la crédibilité de Mme Delorme par rapport à la véracité...

LE TRIBUNAL: Non, non. Non.

M. RANCOURT: ...de ce qu'elle a dans son dossier.

LE TRIBUNAL: Non. C'est pas pertinent, non.

M. RANCOURT: D'accord.

LE TRIBUNAL: Sur le point pertinent,...

M. RANCOURT: D'accord.

LE TRIBUNAL: ...il y a pas de contradiction.

M. RANCOURT: C'était ma demande.

LE TRIBUNAL: Okay.

C'est la seule question?

M. RANCOURT: Ben, toutes les questions se rattachent à ça.

LE TRIBUNAL: Okay.

M. RANCOURT: Et aussi au degré de connaissances de Mme Delorme et de.... Mais par rapport aux points précisément pertinents, je pense que je peux abandonner ça.

LE TRIBUNAL: Parce qu'ils ont répondu.

Est-ce qu'on peut procéder avec la question de Me St. Lewis ou est-ce qu'il est mieux de rapporter ça, si ça va être long? Parce que nous avons encore 15 minutes.

M. RANCOURT: Je pense qu'on peut la conclure.

THE COURT: Are you done with....

MR. DOODY: Just – just so that I'm clear, Your Honour: as I understand it, Mr. Rancourt has either received a ruling from the Court or withdrawn – withdrawn on the basis...

THE COURT: Withdrawn...

MR. DOODY: ...on the....

THE COURT: ...on the understanding...

MR. DOODY: ...on the basis....

THE COURT: ...that the Court has already ruled on it.

MR. DOODY: Exactly.

THE COURT: And ceased.

MR. DOODY: With respect to all of these requests.

THE COURT: So I'm not going to write "abandoned." I will write "already ruled on."

MR. DOODY: That's fine. Including.... Including with respect to the Notices of Examination and the Summons to Witness. Those issues are now dealt with, as I understand it?

LE TRIBUNAL: Pas si une catégorie distincte.

M. RANCOURT: C'est-à-dire que oui, je veux dire la Notice où j'ai demandé des documents...

LE TRIBUNAL: Mm-mmm, all right.

M. RANCOURT: ...pertinents à Mme Delorme, étant donné que je n'avais plus pas....

LE TRIBUNAL: Et M. Rock également?

M. RANCOURT: M. Rock – on n'a pas traité de cette question-là, je pense.

LE TRIBUNAL: Non. C'est pour ça on veut savoir là, parce que....

M. RANCOURT: Okay. M. Rock, j'aimerais regarder donc la notice en question.

LE TRIBUNAL: Ce sont des documents qui ressemblent énormément même documents que je crois M. Giroux....

M. RANCOURT: Donc ça va être rapide. J'ai uniquement besoin de les regarder rapidement.

Je pense que c'est l'onglet "B," 2-B de mon livret, si je me trompe pas.

LE TRIBUNAL: Deux?

M. RANCOURT: Deux-B.

LE TRIBUNAL: Deux-B.

M. RANCOURT: Vous voyez dans cette notice, j'avais demandé:

"University's improper motive – malice."

Donc c'était clair, même dans le motif. Mes opposants ne sont pas opposés à ça à ce moment-là.

LE TRIBUNAL: Deux-D.

M. RANCOURT: Et donc on a déjà réglé la question des paragraphes 7 et 8. Il y a déjà eu des décisions de la Cour sur ça. Par contre, et le seul que j'aimerais....

LE TRIBUNAL: Non, non, mais est-ce que dans votre Dossier de motion vous avez comme une liste des refus? – parce que Me Doody avait préparé quelque chose.

5 And the contracts and funding agreements and/or terms of reference with the Gowlings law firm and with the BLG law firm, again, they come within the financial considerations on which Your Honour has already ruled.

10 And in addition, the arrangements and the invoices with the BLG law firm are privileged, and the authority for that is the Sinclair Stevens case in the federal Court of Appeal that's in my Book of Authorities.

M. RANCOURT: J'ai déjà donné des précisions j'étais d'accord avec ce dernier point.

15 Effectivement, tel qu'on a défini ce qui est pertinent dans les décisions qui avaient été prises aujourd'hui, il y aurait probablement très peu de courriels. Le courriel que j'ai divulgué aujourd'hui est très pertinent à la question de motif,...

LE TRIBUNAL: Mais vous avez,...

M. RANCOURT: ...mais si on exclut le motif...

20 **LE TRIBUNAL:** ...ce sens, très élargi de - de motif, très répandu.

C'est la seule?

M. RANCOURT: C'est un autre sujet. Donc, oui.

THE COURT: Okay. We're out of time.

25 **MR. DEARDEN:** Your Honour, could I just ask.... I know we're out of time, but there's one - issue number 7 - in the Joanne St. Lewis matter that does deal with Allan Rock, and with Mr. Doody here.... And I think you've already ruled on it. It's:

30 "Can you undertake to instruct your counsel to provide all e-mail communications with Allan Rock that are relevant to this litigation?"

THE COURT: The question is the – the specific question is:

"...undertake to instruct your counsel to provide all e-mail communications."

5 So that question.

M. RANCOURT: Avant de prendre une décision, je veux faire des soumissions sur les propos de M. Dearden qui, d'après moi, ne sont pas une bonne caractérisation de la situation, mais je regarde
10 l'heure et je m'aperçois qu'on a peut-être pas le temps. Alors je veux savoir si je vais avoir le temps de faire une soumission.

LE TRIBUNAL: Pense pas qu'on a le temps.

I mean you can – you don't have to be here to deal
15 with this.

MR. DOODY: No. I think that's right, Your Honour.

THE COURT: Okay. We'll deal with this on the next – July 24th. So we'll have to deal with
20 Ms. St. Lewis' refusals at that time. We'll start that way and we'll continue with the refusals from the examinations for discovery.

MR. DEARDEN: And there will be two motions, Your Honour. There will be my motion, and I'm
25 sure Mr. Rancourt will have a motion as well.

THE COURT: Okay.

M. RANCOURT: C'est ça. Et on n'a pas décidé dans quel ordre nous allons faire ces deux motions.

LE TRIBUNAL: C'est qui a signifié le premier
30 ordinairement.

M. RANCOURT: Non. C'était simultanée, parce que ça s'est décidé dans un – dans une conférence pour la cause.

TAB D

COUR SUPÉRIEURE DE JUSTICE
(DIVISION CIVILE)

T A B L E D E S M A T I È R E S

À la page

Requête que le juge se récuse

2

TRANSCRIPTION DEMANDÉE LE: 24 juillet 2012
DEMANDE REÇUE LE: 24 juillet 2012
TRANSCRIPTION COMPLÉTÉE LE: 17 août 2012
AVIS DONNÉ LE: 20 août 2012

COUR SUPÉRIEURE DE JUSTICE
(DIVISION CIVILE)

E N T R E :

JOANNE ST. LEWIS

(Demanderesse)

E T

DENIS RANCOURT

(Défendeur)

M O T I O N S

ENTENDUE DEVANT L'HON. JUGE ROBERT N. BEAUDOIN
Mardi le 24 juillet 2012 à Ottawa

(Tome II)

Comparutions:

R. Dearden

D. Rancourt

Avocat pour la Demanderesse

Pour lui-même

Mardi,
le 24 juillet 2012.

(10h06)

5

MR. DEARDEN: Good morning, Your Honour.
I'll go get Mr. Rancourt.

...Le greffier annonce l'ouverture du Tribunal

10

LE TRIBUNAL: Bonjour, M. Rancourt.

M. RANCOURT: Bonjour.

THE COURT: So, to be clear: again today,
Mr. Dearden, you can make your submissions in
English without being translated – to you?

15

M. RANCOURT: Oui. Ça a toujours été comme
ça qu'on a fonctionné.

LE TRIBUNAL: Okay. Mais on continue toujours
comme ça.

M. RANCOURT: Oui.

20

LE TRIBUNAL: C'est uniquement le cas de
représentations que vous allez faire en français.

M. RANCOURT: Qui sont traduites.

LE TRIBUNAL: Qui seront traduites pour
M. Dearden. Okay? D'accord.

25

Là, je voudrais bel et bien.... Je sais qu'on continue
toujours la question des refus...

MR. DEARDEN: Your Honour, sorry....

LE TRIBUNAL: ...lors des contre-interrogatoires.

MR. DEARDEN: My translators are standing
there, Your Honour.

30

THE COURT: Oh, okay.

MS. BORRIS: We need to be affirmed, Your
Honour,...

THE COURT: All right. I'm sorry.

MS. BORRIS: ...if it please the Court.

MR. DEARDEN: And, Your Honour, while that's happening, may I have your permission again to use my Echo Smartpen to take notes?

THE COURT: Sure. No problem.

MS. BORRIS: Good morning, Your Honour.

ODETTE BORRIS AND DANIEL RENAUD: AFFIRMED

(as interpreters – French/English)

...Interpretation to be provided *sotto voce* from French to English only, appearing herein indented and in italics in order to set it apart from what is spoken in the courtroom

MR. DEARDEN: So, Your Honour, while they're getting into the booth, my list of things to do today would be firstly to deal with the defendant's champerty refusals motion with respect to Professor St. Lewis, and then the second motion would be Prof. St. Lewis's refusals motion in the libel action, and then followed by Mr. Rancourt's refusals motion in the libel action.

M. RANCOURT: M. le Juge, je dois soulever un point important immédiatement avant de commencer la séance.

We do have an important point here.

Pour les refus, ceci est la première occasion devant le Tribunal...

This is the first occasion in front of the Court.

Et je m'excuse. J'ai laissé mes lunettes de lecture à la maison. Je vais peut-être avoir un peu de misère.

I'm sorry, I may have a bit of a problem. I left my reading glasses at home.

5 Mais c'est la première occasion devant le Tribunal de soulever cette question difficile depuis que cette position s'est cristallisée pour moi.

This is the first opportunity in front of the Court to bring up this difficult question.

10 Je demande que la motion présente soit ajournée pour me permettre d'étudier le procès-verbal de notre dernière séance et de déposer une motion pour demander que vous vous récusiez pour crainte raisonnable de partialité et apparence d'un conflit
15 d'intérêt.

I ask that the present matter be adjourned to allow me to read up on the transcript from the last and I ask that you recuse yourself for appearance of lack of confidentiality. [sic]

20 C'est la première occasion devant le Tribunal. J'avais des craintes et des impressions depuis notre première conférence sur la cause le 8 février 2012, mais pour moi il y a maintenant un patron qui s'est
25 établi que je viens de comprendre, qu'il me paraît concret et réel maintenant....

30 *From our first conference on the 8th of February heard by yourself, I now have established that I have understood.... It appears concrete and real for me....*

Immédiatement après notre première séance du 20 juin 2012 sur la motion des refus pour la motion champartie, j'ai commandé le procès-verbal en urgence le 22 juin 2012.

Immediately after our first hearing on June 20th, 2012 on the refusals motion for the champerty motion, I ordered the transcript on the 22nd of June, 2012.

LE TRIBUNAL: Mm-mmm.

M. RANCOURT: Je n'ai pas encore reçu ce procès-verbal. J'ai besoin de ce procès-verbal pour préparer la motion pour que vous vous récusiez pour crainte raisonnable de partialité. C'est une motion difficile et une position difficile que je dois maintenant prendre et que je dois maintenant exprimer.

I have yet to receive that transcript. I need that transcript to allow me to prepare the motion for your recusal because you have been partial. It is a difficult position that I need to now communicate to the Court and that I now need to express to you.

En tant que personne non-représenté, auto-représenté, j'avais des impressions, des premières réactions qui étaient perturbés, et maintenant je vois un patron, surtout suite à notre toute dernière rencontre du 20 juin 2012 dans la motion présente, et encore un patron, je crois, qui emmènerait une personne raisonnable et informée à avoir une

crainte raisonnable de partialité et d'un esprit fermé devant les questions de la motion de champartie et la motion pour refus et la cause en général.

As an individual – as an unrepresented, or self-represented, party, I was perplexed by your initial reactions and now, especially given the 20th of June, 2012 in the current refusal motions – and now I believe that a reasonable person, an informed, would see your partiality, given the questions with the champerty motion and the refusal motions, as well as the case in general.

Je veux mettre sur le procès-verbal de la Cour des éléments qui m'emmènent à cette position aujourd'hui. Ces éléments sont incomplets sans le bénéfice du procès-verbal de la dernière séance, mais les voici; je les présente pour appuyer ma demande d'ajournement aujourd'hui.

I will now put on the record the items, or issues, that make me raise this today. Without the benefit of the transcript, this list will be incomplete. However, I will give you the list supporting my motion for adjournment.

À la conférence sur la cause du 8 février 2012, nous avons la tâche, entre autres, de cédule ma motion pour champartie et maintenance qui a comme but

premier de radier ou d'arrêter l'action. La Notice de motion était devant la Cour le 8 février.

At the case conference of the 8th of February, 2012, we had the task, among others, to schedule the champerty motion which aim is to either stop or cancel this case – on the 8th of February.

J'ai un extrait du procès-verbal du 8 février ici en commençant à la page 21 – en fait, c'est les pages 21 à 35. J'aimerais souligner quelques éléments de ce procès-verbal.

I have an extract of the transcript of the 8th of February starting at page 21 – page 21 to 35. I have underlined a few elements of that.

MR. DEARDEN: I'll just go on record, by the way, Your Honour,...

M. RANCOURT: *Je veux....*

MR. DEARDEN: ...that Mr. Rancourt has not given me any prior notice that he was going to be making the submissions that he is making now, nor that he was going to be handing out the material that he's handing now; and I also will be strenuously objecting to his latest move here to delay the trial of this action.

M. RANCOURT: J'accepte mal cette caractérisation de M. Dearden et je ne mets pas ces documents en évidence, mais simplement pour un guide pour expliquer pourquoi dans les arguments pour un ajournement....

I don't accept this characterization by Mr. Dearden. This is to

*explain why I am asking in my
argumentation for an
adjournment.*

M. RANCOURT: À la page....

MR. DEARDEN: And just for clarity of the
record....

M. RANCOURT: À la page 21....

MR. DEARDEN: Just for clarity of the record,
Your Honour, if I could, could you have
Mr. Rancourt confirm that he is not disputing the
fact that he did not give me any prior notice that he
was going to seek an adjournment today and claim
that you are biased. Can we just have him
confirm...

LE TRIBUNAL: C'est vrai?

MR. DEARDEN: ...for the record?

LE TRIBUNAL: Vous n'avez pas averti
M. Dearden?

*That's true? You didn't give
Mr. Dearden any warning?*

M. RANCOURT: J'ai préparé ces matériaux ces
derniers jours.

I have prepared....

LE TRIBUNAL: Mais vous l'avez pas averti. C'est
vrai?

You haven't given him any notice.

M. RANCOURT: Non. C'est vrai.

No. That's true.

LE TRIBUNAL: Okay. D'accord.

All right. So no notice was given.

M. RANCOURT: J'ai pas compris vos derniers
mots, M. le Juge.

I didn't hear your last words.

LE TRIBUNAL: D'accord.

"All right," is what I said.

M. RANCOURT: Okay.

LE TRIBUNAL: J'ai compris.

I understood.

M. RANCOURT: Donc, à la page 21, la question de champartie, vous dites, M. Le Juge:

"La question de champartie touche uniquement le cas entre Mme St. Lewis et l'Université. Donc ça n'affecte pas le bien-fondé de la poursuite de libelle diffamatoire contre vous."

So on page 21, the champerty issue, you say :

"That will be solely judged on the relationship between Ms. St. Lewis and the University and it doesn't deal with the defamation suit against you."

Un peu plus bas, à la page 22, vous dites:

"Le Tribunal tranche la question de champartie et dit, bon, et annule l'entente entre elle et l'Université au sujet des frais."

Further, you say :

"The Court will rule on champerty and will cancel – or would cancel – with regards to loans, the agreement on loans."

À la page 23, vous dites, et ce sont que des extraits:

"C'est un gaspillage significatif des ressources."

"Du temps et des parties en question de la Cour?"

Ça c'est moi qui dis ça. Et vous répondez:

"Mais ça ne touche pas la question. Okay?"

On page 23 – these are all extracts:

"This is a waste of resources, of time."

I'm saying that.

And you answer:

"But it doesn't deal with the issue."

Ensuite, à la page 24, je dis:

"Alors, M. le Juge, ce que je veux dire c'est que si la motion pour champartie a un succès, l'action entière est annulée."

On page 24, I say:

"Also, Your Honour, what I'm saying is that if the champerty motion is successful, the entire action is brushed aside."

Et vous dites:

"Non."

You say:

"No."

Ensuite, à la page 25, je dis:

"Peut être annulée. C'est-à-dire qu'il y a une bonne chance que l'action soit annulée, étant donné la jurisprudence."

On page 25, I say:

*"It could be struck.
There's a good chance
that, given case law."*

Et vous dites:

"Non, non. Citez-moi une cause où l'action a été annulée."

And you say :

*"No, no. Give me case
law where an action was
struck."*

Ensuite vous dites, un peu plus bas à la page 25:

"Montre-moi une décision."

*And then you say, a little further
on page 25:*

"Show me case law."

Ensuite je passe à la page 29. Vous dites en haute page à la ligne 3:

"Cette cause-là ne cite pas.... C'est pour...."

*Then on page 29, you say, at the
top of the page on line 3:*

*"This case, it's not
applicable."*

Et je dis:

"Je suis d'accord, M. le Juge."

And I say:

"I agree."

5

Vous dites:

"Ce n'est pas pour la proposition de la poursuite – que la poursuite annule."

10

"It is not for the proposition of the suit – that the suit is nul."

Ensuite, à la page 31, vous dites, à la ligne 16:

"Mme St. Lewis fait une poursuite contre vous de libelle diffamatoire."

15

On page 31, you then say, on line 16:

"Mrs. St. Lewis has launched a libel suit and defamation suit against you."

20

Ensuite vous poursuivez:

"Le bien-fondé de cette poursuite..."

And then you pursue:

"The foundation of this lawsuit is not that."

25

Et vous poursuivez:

"...ce n'est pas ça. Ce n'est pas l'introduction..."

Excusez-moi, ça c'est pas pertinent.

I'm sorry, that's not quite....

Vous dites:

"Le mérite de cette poursuite n'est pas tranché par la question de champartie."

"The merit of this suit is not dealt with the champerty motion issue." [sic]

Et un peu plus loin, à la page 32, vous dites:

"Ça touche uniquement à la question, 'Est-ce qu'elle a le droit d'avoir l'université payer ses frais?'"

And on page 32, you say:

"It only deals – solely deals – with: does she have the right to have the University pay her legal costs?"

À la page 33, vous dites:

"Mais vous n'avez pas identifié dans vos matériaux une telle décision."

On page 33, you say:

"But you haven't identified in your materials such a caselaw."

Et je dis:

"Mais, M. le Juge, je n'ai pas eu l'occasion de faire mon Factum, mais je crois...."

And I say:

"Your Honour, I did not have the opportunity to

*prepare a Factum, but I
do believe...."*

Ensuite, à la page 35, vous dites:

"Non? Je peux vous dire que ça ne vaut pas
la peine. Franchement, la question de
l'entente, ça va être tranchée avant le
procès."

And then, on page 35, you say:

*"No? I can tell you that
this is not worth....
Frankly, the agreement –
the agreement issue will
be dealt with before
trial."*

Je vais soumettre qu'une personne raisonnable et
informée aurait, en entendant ces mots, une crainte
raisonnable que votre esprit était fermé à la possi-
bilité que la motion pour maintenance et
champartie pouvait mener à l'arrêt de la cause
principale même si plus tard vous admettiez la
possibilité.

*I submit that a reasonable and
informed person could, hearing
these words, have a belief that,
given your words – that the
champerty motion could lead to
the full action being struck, even
though you precluded that
possibility.[sic]*

Plus loin dans la même conférence sur la cause à la
page 81 du procès-verbal du 8 février 2012 – et là
j'ai un autre extrait juste à page 81 et 82 de ce
même procès-verbal que je peux vous donner.

Further, in the same case conference on page 81 of the transcript on the 8th of February, 2012 – and there I have another extract, page 81 and page 82 of that transcript, which I can hand up to you and give to Mr. Dearden.

LE TRIBUNAL: Vous devriez, M. Rancourt, ...
Mr. Rancourt, ...

M. RANCOURT: Oui.

LE TRIBUNAL: Si vous retirez d'un procès-verbal, vous devriez le fournir au complet et non pas tirer de certaines pages.

...if you take an extract from a transcript, you should be supplying it in its entirety.

M. RANCOURT: Oui. Je comprends ça, M. le Juge. J'ai fait ça à la dernière minute...

Yes. I understand. But I did that at last minute.

LE TRIBUNAL: Ah, non, mais dans.... Écoute.
No. But we...

M. RANCOURT: ...et....

LE TRIBUNAL: On doit avoir toute la transcription, tout le procès-verbal.

...need the full transcript, the full transcript.

M. RANCOURT: Oui. En ce moment aujourd'hui, je ne fais que mes arguments.

Presently, I....

LE TRIBUNAL: On ne peut pas ré – piéger ici et là, trouver des – des – des remarques d'une page ou

de l'autre, de sauter d'une page à l'autre. Faut le prendre dans son ensemble.

You cannot extract here and there remarks from one page or another and jump from one page to another. You have to take those extracts in their totality.

M. RANCOURT: Aujourd'hui – M. le Juge, je ne fais que présenter mes arguments pour ajourner aujourd'hui et sans mettre des documents devant la Cour. C'est ce que j'ai pu préparer à la dernière minute.

So here I am only presenting – making my arguments for an adjournment.

LE TRIBUNAL: Mais c'est un document qui est en date depuis le mois de février. On a eu plusieurs conférences relatives à la cause par la suite. Et là, vous soulevez la première fois le 24 juillet que les remarques que j'ai fait au mois de février.... Et depuis ce temps-là j'ai pris autres décisions où vous êtes mis en appel – c'est-à-dire la "*open-court principle*." Vous n'avez jamais touché cette question que j'étais préjugé contre vous pour présider à des motions traitant des refus lors des interrogatoires ou des contre-interrogatoires.

But this is a document that's dated since February. We've had several case conferences since – subsequently. And now you're raising for the first time, the 24th of July, that the remarks that I

made in February.... And since that time, I have taken other decisions where you've appealed my rulings – for example, the open-court principle – and you didn't deal with this question that I was prejudiced and biased against you and unable to preside over motions dealing with refusals during the discoveries or the cross-examinations on affidavits.

M. RANCOURT: Monsieur....

LE TRIBUNAL: Ça c'est....

M. RANCOURT: Oui.

LE TRIBUNAL: Ce procès-verbal existe depuis longtemps.

So this – this transcript has been available for a long time.

M. RANCOURT: Oui. M. le Juge, permettez-moi d'expliquer. Comme j'ai dit au début, je ne fais que faire un rappel historique, mais ce sont des événements de notre toute dernière séance qui me préoccupe le plus; et si vous voulez, je peux aller de l'avant à ces événements-là. Si vous avez une objection à ce que je lisse les éléments que je pense se rattachent....

Yes. Let me explain, Your Honour. As I said at the beginning, all I'm doing today is going over the historical, but it's the last occurrences from our last case conference that concern me the most. So

that's why I'm putting those. And if you object that I use those elements that I think pertain....

5 **LE TRIBUNAL:** Non. Si je n'ai pas un procès-verbal au complet, surtout des événements de février.... Moi, je prends connaissance de tout ce qui s'est passé depuis ce temps-là. Sans doute, vous n'avez pas aimé les résultats que vous avez reconnus à la dernière séance.

10 *No. If I don't have a complete transcript, especially the one from February.... I will take - be made aware of everything. Unlikely - or likely, you have not appreciated the rulings and results from the last motion, or case conference.*

15 **M. RANCOURT:** Là n'est pas la question, M. le Juge. Alors permettez-moi de faire mes arguments, s'il vous plaît.

20 *That's not the question, Your Honour. So please allow me to make my arguments.*

MR. DEARDEN: No.

25 **M. RANCOURT:** Je vais....

MR. DEARDEN: No.

No.

M. RANCOURT: Je vais donc....

I will therefore....

30 **MR. DEARDEN:** Just a minute.

M. RANCOURT: Je vais donc....

MR. DEARDEN: Mr. Rancourt,...

LE TRIBUNAL: Attendez un instant.

Please wait a moment.

MR. DEARDEN: ...can you please sit down so that I can address the Court, please?

LE TRIBUNAL: Attendez un instant.

MR. DEARDEN: Your Honour, Mr. Rancourt isn't putting grounds for an adjournment on the record when he's pointing to passages of an incomplete transcript back in February. What he's doing is arguing his bias motion and putting these things on the record – probably for the purpose of that he can write a blog, or Mr. Hickey, who is with us again, can write a blog on...

M. RANCOURT: Je dois m'objecter.

I must object. I must object.

MR. DEARDEN: ...his Student's-Eye View.

LE TRIBUNAL: Attendez.

M. RANCOURT: Complètement inapproprié.

It's highly inappropriate.

MR. DEARDEN: Okay?

LE TRIBUNAL: Attendez.

MR. DEARDEN: And it is completely inappropriate for Mr. Rancourt to be arguing his bias motion that he didn't give notice on. And I want the Court to know that there was twice last week where Mr. Rancourt offered me an opportunity to adjourn today's proceedings. He has – and you'll be hearing about this today if we do continue – he has put an affidavit in of a Mireille Gervais, knowing that she would not be available for my cross-examination,...

M. RANCOURT: C'est faux.

That's not true.

MR. DEARDEN: ...and then offered me....

Will you please be quiet?

M. RANCOURT: Je m'objecte.

I am objecting.

LE TRIBUNAL: Non, non.

MR. DEARDEN: You will have your opportunity, sir.

M. RANCOURT: Je m'objecte...

MR. DEARDEN: You will have...

M. RANCOURT: ...à ces caractérisations.

I am objecting, Your Honour.

MR. DEARDEN: ...your opportunity.

LE TRIBUNAL: M. Rancourt,...

M. RANCOURT: Absolument faux.

LE TRIBUNAL: ...vous aurez – vous aurez pouvoir répondre.

You will be able to reply.

MR. DEARDEN: He put in an affidavit in Prof. St. Lewis – in his refusals motion for Prof. St. Lewis's examination of Mireille Gervais at the very last second that he could do it on Friday, the 13th. He had that affidavit since July the 9th. I say on the weekend 'cause Friday – I got it just before office hours ended. I write him on the Sunday. I serve him with a Notice of Examination. He immediately writes me back and says, "She's gone 'til August 2nd but I'll give you an adjournment."

I'll get into that in more detail because I'm actually going to seek costs on a full-indemnity basis for what he did there.

Then he also cross-examined...

M. RANCOURT: M. le Juge,...

Your Honour, but...

MR. DEARDEN: ...on Friday....

LE TRIBUNAL: Asseyez-vous.

M. RANCOURT: ...la motion qui va venir....

...I want to intervene.

LE TRIBUNAL: Asseyez.

MR. DEARDEN: No. I'm just putting on the record, Your Honour, that this – there was attempts by Mr. Rancourt to adjourn today's three motions. And that was the first one, Mireille Gervais' cross-examination. "We'll adjourn today and you can cross her when she's back in August."

And then he cross-examined our process server, [sic] who we sent to try to attempt to personally serve Ms. Gervais on Friday the 13th, and he couldn't. He served at the office.

And again – so then Mr. Rancourt serves me with a Notice to Cross-examine the process server and I say, "He's on holidays Monday but he is available on Friday."

He initially refuses to do any of that. "No." You know, "You can have an adjournment, but I," you know, blah, blah, blah. So....

M. RANCOURT: C'est complètement faux.

It's false.

LE TRIBUNAL: Asseyez-vous.

M. RANCOURT: Et les...

LE TRIBUNAL: Asseyez.

M. RANCOURT: ...documents le montrent.

And the documents show it.

LE TRIBUNAL: Asseyez-vous. Asseyez-vous.

Please sit down, sir.

MR. DEARDEN: So he's twice tried to seek an adjournment of today; and to, without notice, stand up now and ask that these three motions be adjourned is nothing but his attempt again to get an adjournment that I was not agreeing to because Prof. St. Lewis wants to get on with this libel action as fast as possible. And that's what he's doing, in my respectful submission.

He could have ordered the June 20th transcript on an expedited basis. We are – what? – July 24th today. He could have ordered that on an expedited basis. He did not do that. He would've had it. He could have filed a proper motion. Didn't do it. He knows the Rules actually better than – than, I think, half the people in this city. He knows what he's doing; and to do what he's doing now is completely objectionable.

LE TRIBUNAL: M. Rancourt, j'insiste. Vous devez préciser les motifs sur lesquels vous dites que je devrais me retirer.

Mr. Rancourt, I insist that you be precise about the grounds on which you say that I should recuse myself.

M. RANCOURT: Oui. Si j'ai bien compris, M. le Juge, vous me demandez de préciser ces motifs; c'est-à-dire préciser les raisons pour lesquelles je fais cette demande. C'est ça?

Yes. If I understood correctly, Your Honour, you're asking me to be more precise with these

grounds; that is, be precise about my reasons for which I'm bringing about my request, yes?

5 Et oui, je suis prêt à faire ça. Je suis en milieu de présentations mais je – j'en ai pour une autre cinq ou dix minutes. Et c'est des choses qui m'inquiètent beaucoup et je veux les présenter très clairement, sans plus d'interruptions, je l'espère.

10 *I am ready to do that. I'm in the middle of my presentation. I have another five to ten minutes of presentation. And these are things that preoccupy me a lot and I will present them very*
15 *clearly without any further interruptions – I hope.*

LE TRIBUNAL: Est-ce que...

Do you....

20 **M. RANCOURT:** Mais....

LE TRIBUNAL: ...vous tenez sur des choses que j'ai dites au courant des conférences relatives à la cause lors de l'audition de la dernière motion...

25 *Are you talking about things that I was aware during case conferences or the last hearing or...*

M. RANCOURT: Non.

LE TRIBUNAL: ...ou autre chose?

...other things?

30 **M. RANCOURT:** Oui, autre chose sûrement. Et je vais les présenter. Donnez-moi une chance, s'il vous plaît, M. le Juge.

Well, yes, other things. I want to present them. Please, Your Honour, give me a chance.

5 Mais avant de poursuivre ça, je veux m'objecter à la mécaractérisation des faits que M. Dearden vient de faire. C'est absolument, à mon sens, énorme. Il y a des documents; il y a des courriels qui montrent les dates. Il y a une contorsion des faits, que je n'apprécie pas du tout.

10 *But before going in that vein, I want to object to the mischaracterization of the facts from Mr. Dearden, which, in my sense, is huge. There are documents, e-mail showing dates. There's a contortion of facts, that I don't appreciate at all.*

15 Et en plus, M. le Juge, j'ai remarqué que quand M. Dearden a parlé de bloguer et de M. Hickey, j'ai remarqué votre regard avec les yeux agrandis qui regardaient vers M. Hickey.

20 *And on top of that, Your Honour, I noticed that Mr. Dearden talked about blogging. I noticed your look with big eyes in the direction of Mr. Hickey.*

25 À mon sens, M. le Juge, les blogs, les médias, ça fait partie du concept de la cour ouverte....

30 *In my opinion, the blogs, the media, that is part of open-court concept.*

MR. DEARDEN: Just.... Just for the record, Your Honour,...

M. RANCOURT: ...et on n'a pas...

We didn't do....

MR. DEARDEN: ...I want to...

M. RANCOURT: ...on n'a pas...

MR. DEARDEN: ...object to what he said here,
what was....

Excuse me, sir. You're not....

M. RANCOURT: Il est en train de
m'interrompre....

He's in the process...

MR. DEARDEN: You're not going....

M. RANCOURT: ...pendant que moi....

...of interrupting me.

M. RANCOURT: Alors....

THE COURT: Sit down, Mr. Dearden.

Je reviens. Je donne cinq minutes pour préciser les
motifs sur lesquels vous dites je devrais me retirer
de ce dossier.

*I come back now to.... I'm giving
you five minutes to be more pre-
cise on the grounds upon which
you rely to say that I should
recuse myself.*

M. RANCOURT: Ça va peut-être prendre sept
minutes, M. le Juge.

It might take seven.

LE TRIBUNAL: Cinq. Je vous donne cinq.

I am giving you five.

M. RANCOURT: Alors, je vais essayer de faire le
tri, dans ce cas-là. Donnez-moi quelques secondes
pour faire ça.

So I'll try and go through it in that case and just take out the significant items. Give me a few seconds to do that, please.

5

Okay. Le 20 juin 2012, l'Université avait mis de l'avant un affidavit de Me Roussy.

June 20th, 2012, the University had put forth an affidavit from Maître – from Alain Roussy.

10

Est-ce que c'est le meilleur exemple?

M. le Juge, la contrainte dans le temps me – me stresse beaucoup.

You know, the fact that I'm limited with time, I'm very stressed.

15

LE TRIBUNAL: Écoute. Vous avez fait ça à la dernière minute.

Well, you did that at the last minute. I'm listening to you.

20

M. RANCOURT: Oui.

LE TRIBUNAL: Je vous entends. J'aurais pu dire uniquement que vous n'avez pas donné un avis au préalable, c'est rejeté.

I could have said uniquely you didn't give forward motives and it's rejected.

25

M. RANCOURT: Merci de m'entendre, M. le Juge.

Well, thank you on my behalf, Your Honour.

30

LE TRIBUNAL: Est-ce que vous tenez uniquement – vous basez votre motion sur des remarques

que j'ai fait lors des conférences relatives à la cause ou dans le contexte de l'audition de la dernière motion?

Do you insist uniquely – uniquely – singularly – on comments I made at case conferences, or in the context of the last motions hearing?

M. RANCOURT: Non, M. le Juge.

No.

LE TRIBUNAL: Autre chose?

Other things?

M. RANCOURT: Oui, autre chose aussi.

Yes, also other things.

LE TRIBUNAL: Qu'est-ce qui est central?

Okay. What are they?

M. RANCOURT: Alors, il y a l'ensemble de certaines choses que vous avez dites pendant nos rencontres.

Well, there's the whole of certain comments that you made during our meetings.

On a eu trois rencontres pour la cause, je crois – le 8 février, le 4 avril et le 4 mai – et aussi pendant la dernière rencontre dans cette motion, qui était le 20 juin; et aussi en faisant ce travail maintenant que ça se concrétise dans mon esprit. J'ai fait une recherche sur le Web à votre regard, M. le Juge, et j'ai trouvé des éléments qui sont très inquiétants.

We had three meetings for the case, right? – 8th of February, April 2nd, May 4th – and also the

last meeting, 20th of June, for this motion; and also the work that was done now that it's becoming clear in my mind. I did a search on the Web about you, Your Honour, and I found elements that are very preoccupying.

LE TRIBUNAL: Okay.

M. RANCOURT: Et entre autres....

Among others....

Et donc, vous – si je comprends bien, vous voulez que j'aille à ces éléments-là, qui sont...

LE TRIBUNAL: Oui.

M. RANCOURT: ...les éléments additionnels.

If I understand correctly, you want me to touch on the additional elements that I have.

Alors, j'ai ici – trouvé un article, auquel je viens juste de découvrir en faisant cette recherche il y a un jour, qui a apparu dans *le Citizen* le 24 avril 2012.

So here I have.... I found about you an article – I just discovered this a day ago – that appeared the 24th of April, 2012, an article that appeared in The Citizen.

J'en donne une copie à M. Dearden et je vous en donne une copie.

I give you a copy, and a copy to Mr. Dearden.

Dans cet article, qui pourrait contenir des erreurs factuelles mais qui aussi pourrait être correct – de

toute façon, c'est ce que le public voit – on dit, à la première page....

In this article, that may, or could, contain factual errors – may or may not – but in any event, this is what is read by the public, it is stated on page one....

On parle de votre fils et on dit:

We talk about your son, and it says:

“Beaudoin is still picking his way through the rocky landscape of grief.”

Donc cette affaire vous préoccupe encore beaucoup.

So this – you're still preoccupied by that.

Et un peu plus bas, on dit:

And a little further:

“Says Beaudoin, ‘One impulse you have when you lose a child is to make sure their name isn't lost and people remember them.’”

Dans l'article vous expliquez que c'est une chose que vous faites pour garder la mémoire de votre fils en vie.

In the article you explain that this is something that you do to keep the memory of your son alive.

Et un peu plus tard dans cet article, il est dit:

And a little further in this article, it is said:

“The first – after a few rough months, the first step his family took was to set up a

scholarship in Ian's name at the University of Ottawa Law School. Beaudoin was also delighted that the law firm Borden Ladner Gervais, where his son was a second-year patent lawyer, named a meeting room after him."

Et ensuite on vous cite en disant:

And then you're quoted:

"So every day someone says, 'You can meet in the Ian Beaudoin Room.'"

Alors il y a, M. le Juge...

So therefore there is, Your Honour....

MR. DEARDEN: What you just did, Mr. Rancourt....

M. RANCOURT: M. le Juge....

MR. DEARDEN: I am objecting.

LE TRIBUNAL: Attends.

M. RANCOURT: Pourquoi cette interruption?
Why is there an interruption?

MR. DEARDEN: What you just did...

LE TRIBUNAL: Attendez. Just wait.

MR. DEARDEN: ...is sickening. It is sickening, what you just did, sir.

M. RANCOURT: Pourquoi à ce que...

MR. DEARDEN: I'm putting that on the record. I cannot believe that you would do that.

M. RANCOURT: M. le Juge, je - je - je prends note que vous permettez une telle interruption - ce qui n'est pas correct donc, ce que M. Dearden a fait. C'est comment....

Your Honour, I take notice that you are allowing such an

interruption. What is not right....

What is not....

MR. DEARDEN: No. I did it knowing full well, Mr. Rancourt, that you were going to object; and I'm standing up again saying what you just did has me actually shaking. I'm actually shaking – that you would do that, sir.

M. RANCOURT: Moi, je trouve ces commentaires inappropriés.

*I find that comment
inappropriate.*

LE TRIBUNAL: Je trouve....

I find....

M. RANCOURT: Alors....

LE TRIBUNAL: Je trouve vos remarques tellement choquantes et provoquantes, qui voulaient utiliser l'angoisse que j'éprouve au décès de mon fils et d'un projet qu'on a lancé dans la communauté à sa mémoire, ou prétendent que cet esprit d'angoisse me bouleverse tellement que je suis incapable de trancher les questions en jeu, je – je trouve ça....

I find your remarks so provocative and so insulting, that you would use them, the anguish that I would be going through as a result of the death of my son, and a project that was launched in the community in his memory, to purport that this feeling of anguish is so perturbing to me that I am incapable of ruling questions at issue. I find it....

M. RANCOURT: Je n'ai pas prétendu ça, M. le Juge. J'aimerais corriger. Je n'ai pas...

I did not put that out there. I'd like to correct.

LE TRIBUNAL: Je trou'...

M. RANCOURT: ...prétendu ça.

LE TRIBUNAL: Je trouve tellement choquant qu'un homme qui se dit professionnel à la recherche de la justice a pu pencher aussi bas que ça.

I find it so – so shocking that a man who would claim to be professional, seeking justice, would have stooped so low as to do that.

M. RANCOURT: Mais permettez-moi de faire mon argument, M. le Juge.

But please allow me to make my...

LE TRIBUNAL: Votre motion est complètement – de retard – est rejetée.

Your motion is out of time and it is not granted.

M. RANCOURT: M. le Juge...

LE TRIBUNAL: Nous procédons.

M. RANCOURT: M. le Juge,...

LE TRIBUNAL: Nous procédons.

M. RANCOURT: ...je n'ai même pas fait mon argument.

I have not even....

LE TRIBUNAL: Nous procédons.

We are going to proceed.

M. RANCOURT: M. le Juge...

LE TRIBUNAL: Nous procédons.

We are going to proceed.

M. RANCOURT: Je n'ai pas fait mon argument.

I did not even....

LE TRIBUNAL: Nous procédons.

We are going to proceed.

M. RANCOURT: J'ai lu...

LE TRIBUNAL: Nous procédons.

M. RANCOURT: ...quelques pages.

THE COURT: Go ahead with....

M. RANCOURT: Vous avez une entente
financière avec l'Université d'Ottawa.

*You have a financial agreement
with the University of Ottawa.*

Il y a une bourse au nom de votre fils. L'Université
d'Ottawa a dû approuver cette entente financière.

Elle peut annuler cette entente financière. Et vous
avez exprimé publiquement, M. le Juge, que c'est –
c'est...

*There is a scholarship in the name
of your son. The University of
Ottawa had to approve that
financial arrangement and can
annul that financial arrangement.
And you publicly expressed that...*

LE TRIBUNAL: Je répète....

I will repeat....

M. RANCOURT: ...c'est important pour vous.

LE TRIBUNAL: M. Rancourt, je répète: votre
motion pour un ajournement est refusée. Refusée.
Continue.

*M. Rancourt, I will repeat: your
motion for an adjournment is
denied. Denied.*

M. RANCOURT: Et donc est-ce qu'on....
And therefore....

LE TRIBUNAL: Est refusée.
Denied.

M. RANCOURT: Oui. Est-ce que on....
Yes.

LE TRIBUNAL: Motion d'ajournement – refusée.
Your adjournment motion is refused.

M. RANCOURT: J'avais....

LE TRIBUNAL: Refusée!
It's refused.

M. RANCOURT: D'accord. J'ai compris.
I understood, Your Honour.

M. le Juge, je tiens à signaler que vos....
Your Honour, I would like to....

LE TRIBUNAL: Je prends une pause, et quand je reviens, dans 15 minutes, si vous osez continuer cette attaque personnelle contre moi en évoquant la mémoire de mon fils, je vais vous reconnaître en outrage au Tribunal. Nous procédons, dans un retard de 15 minutes, avec la motion pour les refus.

I will take a recess, and when I come back, in 15 minutes, if you dare continue this personal attack against me invoking the memory of my son, I will find you in contempt of court, sir. We are going to proceed, with 15 minutes' delay, with the motion to deal with the refusals.

CLERK OF THE COURT: Court is now in recess.

COURT SERVICES OFFICER: Order. All rise.

À l'ordre. Levez-vous.

LA SÉANCE EST SUSPENDUE (10h33)

À LA REPRISE : (10h50)

5 **LE TRIBUNAL:** M. Rancourt, je tiens à souligner qu'il n'y a, à mon avis, aucun conflit entre moi et l'Université d'Ottawa à cause d'une bourse qu'on a créé à la mémoire de mon fils.

10 *Mr. Rancourt, I want to tell you quite sincerely that there is no conflict between myself and the University of Ottawa because of a scholarship in the memory of my son – created in the memory of my son.*

Il n'y a pas de possibilité d'annuler cette bourse.

15 *There is no possibility of cancelling this scholarship.*

C'est un contrat qui était conclu entre moi, le gouvernement de l'Ontario, qui a également contribué en fonds sommes égales, l'établissement de cette bourse.

20 *It is a contract that was contracted between myself, the Government of Ontario, who also contributed an equal amount of money to the establishment of this scholarship.*

25 Pas de possibilité d'annuler cette bourse. Il y a pas de conflit d'intérêts.

30 *There is no possibility of this being cancelled, this scholarship. There's no conflict of interest.*

Par contre, je trouve que votre geste ce matin en me remettant une copie de cette article qui existe depuis trois mois....

However, I find that your conduct this morning, by giving me a copy of this article that has been available for the last three months....

Et vous faites ça souvent, hein? Vous arrivez à la dernière minute. Vous vous prétendez, "Je viens de découvrir." C'est un truc favori chez vous.

You do that often. You arrive at the last minute. You pretend, "I've just discovered." It's one of your favourite tricks, isn't it?

Pourtant, c'était dans le grand public depuis trois mois.

However, it's been available to the members of the public for three months – over three months.

Et vous tenez non seulement à lire le paragraphe qui fait référence à la bourse, vous tenez à souligner l'angoisse que j'éprouve toujours auprès de la mort de mon fils.

And you insist not only in reading the paragraph that refers to the scholarship, you underline the anguish that I am still dealing with as a result of the death of my son.

Jamais, jamais de ma carrière juridique, que j'ai vu un geste aussi écœurant, provoquant, et complètement indigne. Vous aurez pu faire ça. Pour...

*Never, never in my legal career
have I seen such a dispicable
action, provocative, completely
unbecoming. You could do that,...*

M. RANCOURT: M. le Juge, je....

Your Honour....

LE TRIBUNAL: ...prendre mon angoisse et me le
jeter en face comme ça...

*...take my anguish and throw it in
my face.*

M. RANCOURT: M. le Juge, c'est....

Your Honour....

LE TRIBUNAL: ...j'ai, malheureusement....

I have, unfortunately....

M. RANCOURT: Vous.... Vous....

LE TRIBUNAL: Vous avez réussi. Vous avez
réussi, M. Rancourt. Je ne peux plus continuer à
présider dans votre présence. Je serais incapable.
Vous avez réussi.

*You have succeeded,
Mr. Rancourt. You've succeeded.
I cannot continue to preside in
your case. I will be incapable.
You have succeeded, sir.*

Vous m'avez provoqué tellement avec ce geste le
plus pénible on aurait pu m'imposer, que je suis
incapable d'être juste envers....

*You have provoked me to such an
extent with this action, the most
painful that I could have been
asked to deal with, I can't - I
can't be just towards you.*

Il faudra trouver un autre juge présider, acquitter
frais, des frais dépens de cette présence
aujourd'hui.

*A new judge will need to be found
to preside over this action and
that will deal with the cost of your
attendance today.*

M. RANCOURT: M. le Juge, je dois signaler....

COURT SERVICES OFFICER: Order. All rise.

À l'ordre. Veuillez-vous lever.

M. RANCOURT: M. le Juge....

Your Honour....

LA SÉANCE EST LEVÉE

(10h54)

Formule 2**CERTIFICAT DE TRANSCRIPTION***Loi sur la preuve, paragraphe 5(2)*Je, **la soussignée,****Leona M. Scott****certifie que**

(Nom de la personne autorisée)

le présent document est une transcription exacte et fidèle de l'enregistrement de l'affaire

Joanne St. Lewis c. Denis Rancourt

dans la

Cour supérieure de justice

(Nom de la matière)

(Nom de la cour)

entendue à

161, rue Elgin à Ottawa mardi, le 24 juillet 2012

(adresse de la cour)

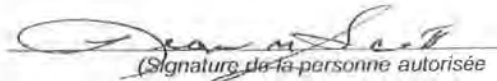
prise de l'enregistrement

0411-35-20120724

, qui a été certifié en Formule 1.

Le 20 août 2012

(Date)


(Signature de la personne autorisée)

TAB E

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

JOANNE ST. LEWIS

Plaintiff

and

DENIS RANCOURT

Defendant

NOTICE OF MOTION

The Defendant, Denis Rancourt, will make a motion to the court on Oct 18, 2012 at 10:00 a.m., at the Ottawa Courthouse, 161 Elgin Street, Ottawa, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard:

☒ orally.

THE MOTION IS FOR:

1. A judicial determination that there was reasonable apprehension of bias regarding Justice Beaudoin in this action; and
2. In the alternative of the latter determination, a judicial determination that Justice Beaudoin's July 24, 2012 recusal was, although not stated explicitly by Justice Beaudoin, for the reason of reasonable apprehension of bias; and
3. An Order that all the rulings and/or determinations and/or findings and/or orders of Justice Beaudoin in this action be set aside, including:

- (a) the case management ruling that discoveries continue in parallel with the maintenance and champerty motion; and
 - (b) the case management ruling that the University of Ottawa has intervener status in the maintenance and champerty motion; and
 - (c) the findings of credibility of the defendant made on June 20, 2012; and
 - (d) the ruling made on June 20, 2012, to not allow the defendant an adjournment to cross-examine University of Ottawa's affiant Alain Roussy in the refusals motion for the maintenance and champerty motion; and
 - (e) the ruling made on June 20, 2012, of inadmissibility of the affidavit of the defendant's expert information technology engineer, Louis Beliveau; and
 - (f) the rulings made on June 20, 2012, on refusals in the refusals motion for the maintenance and champerty motion; and
4. An Order that all rulings set aside cannot stand, and, where needed to continue the proceedings, can only be resolved by *de novo* hearings; and
 5. An Order that all other motions in the action be stayed pending determination of the instant motion; and
 6. An Order that the plaintiff's costs thrown away submission for the July 24, 2012 hearing be stayed pending determination of the instant motion; and
 7. The costs of this motion on an appropriate scale; and
 8. Such further and other relief as the Defendant may advise and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

Introduction

1. The action is under case management, by consent, and up until July 24, 2012, the case-management judge was Justice Beaudoin.
2. The plaintiff is a professor at the Faculty of Law at the University of Ottawa. The present lawsuit is fully funded by the University of Ottawa. The decision to fund the action was made by the university's president, Mr. Allan Rock.

3. Currently, there is a motion seeking to dismiss the action on the grounds of maintenance and champerty pending before the Court. The University of Ottawa was granted intervener status in this motion (by Justice Beaudoin, without its motion for intervener status being argued). The University of Ottawa is represented by the BLG law firm.
4. The hearing of a refusals motion brought by the defendant in relation to cross-examinations of affidavits from officers of the University of Ottawa started on June 20, 2012, and was to continue on July 24, 2012.

Request to bring a recusal motion

5. Since the appointment of Justice Beaudoin as case management judge, he has made a number of statements and/or determinations and/or findings in the courtroom that show a reasonable apprehension of bias.
6. On July 22, 2012, the defendant found out from an article published in the Ottawa Citizen (April 24, 2012) that Justice Beaudoin has financial and/or emotional ties both to the University of Ottawa, and the BLG law firm representing the University of Ottawa in the present proceeding. The article states that Justice Beaudoin donated money to the University of Ottawa to establish a scholarship in the name of his late son, that his late son was a lawyer at BLG, and that BLG named a boardroom after his late son.
7. On July 24, 2012, at the beginning of the continuation of the said refusals motion hearing, the defendant advised the Court that he was seeking to adjourn the hearing to allow him to prepare a motion to request that Justice Beaudoin recuse himself from the case on the grounds of reasonable apprehension of bias and appearance of conflict of interest.
8. The transcript of the July 24, 2012 hearing (not yet available) will show that shortly after the defendant started presenting his argument that the refusals motion needed to be adjourned, Justice Beaudoin expressed that he wished the reasons for recusal to be given and that he would limit the reasons to five minutes.
9. Within the five minutes, Justice Beaudoin asked if the defendant was relying only on the June 20, 2012 hearing, then asked if the defendant was relying on something other than that.
10. The defendant stated that he relied on an ensemble of elements and that recently he had discovered media articles of further concern.
11. The defendant then quoted from the April 24, 2012 article of the Ottawa Citizen, but before the defendant could make further submissions, Justice Beaudoin expressed disapproval, impeded the defendant's attempt to proceed to explain his concerns, and called for a 15 minute recess.

after stating that if the defendant dares to again after recess bring forth the personal matter invoking the memory of the Justice's son he would be found in contempt of court.

12. Following recess, Justice Beaudoin was visibly angry. He made negative statements about the defendant's character, and stated that, in his opinion, he was not in conflict (of interest) with the University of Ottawa by a scholarship in the memory of his son, that it was a contract concluded between himself, involving the government of Ontario which had contributed equal funds, and that the University of Ottawa could not end the agreement.
13. Justice Beaudoin stated that in his judicial career he had never seen a gesture so disgusting. He added that the defendant had so provoked him that he would recuse himself from all matters involving the defendant. He stated that the question of costs would be dealt by another judge.
14. On June 20, 2012, the hearing of the defendant's refusals motion was not completed. Although Justice Beaudoin made rulings from the bench — including to find the defendant's expert's affidavit inadmissible on technical grounds, to not allow the defendant to cross-examine the University's affiant for the motion, and to not allow several of the defendant's refusals requests — no endorsement and/or written reasons and/or order were provided.

Unique circumstances

15. These are unique circumstances in which a judge has recused himself in mid-motion, without a motion for recusal having been brought or heard, without allowing an adjournment to allow a recusal motion to be brought, while not finding a reasonable apprehension of bias, but rather concluding an absence of conflict (of interest) and stating the reason of the recusal as being the defendant's in-court behaviour.

16. This has deprived the defendant of a judicial determination of whether reasonable apprehension of bias existed and thus represents a liability in the maintenance of public confidence in the judiciary. In the words of the Divisional Court:

"The appearance of justice must be addressed"

Authorson v. Canada, [2002] O.J. No. 2050 (ON DC); para. 1

17. A determination of reasonable apprehension of bias is needed both to restore harm to confidence in the judiciary and because a finding of reasonable apprehension of bias necessitates the remedies established in the jurisprudence to restore justice.

18. The Ontario Court of Appeal has stated it this way, by approval of other decisions:

"... in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality"

And concluded, again by citing another authority:

... if he fails to disclose his interest and sits in judgement upon it, the decision cannot stand.
 ... if the interest is not disclosed, the consequence is inevitable.

Benedict v. The Queen, 2000 CanLII 16884 (ON CA); para. 19

19. And further, if reasonable apprehension of bias is found, the matter cannot be solved by determinations of the impugned rulings of Justice Beaudoin at a hearing of the instant motion.

Counsel for Mr. Benedict submitted that even if we were to find apparent bias we should, nevertheless, affirm the result reached by Molloy J. on the motion, or, in the alternative, permit counsel to argue the motion *de novo*. We declined counsel's request. For the reasons discussed in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at 625, if a reasonable apprehension of bias arises, it colours the entire proceedings and it cannot be cured by the affirmation of the underlying decision. As stated in *Pinochet* and in *Lannon*, where there is a reasonable apprehension of bias, the decision cannot stand.

Benedict v. The Queen, 2000 CanLII 16884 (ON CA); para. 33

20. Also, the Court of Appeal applies the same standard for ruling on bias to both interlocutory and final decisions:

... the above cases arose from challenges to final decisions rather than interlocutory rulings like the one at issue. In my view, this is not a meaningful difference. ... Further, there is no reason why the Divisional Court should approach an interlocutory ruling on bias in a different manner than if the issue was raised after the completion of the proceedings.

Ontario Provincial Police v. MacDonald, 2009 ONCA 805; para. 38

Events following the July 24, 2012 hearing

21. The plaintiff through her counsel wrote two letters to Regional Senior Justice Hackland, dated July 24, 2012, and July 25, 2012, in order to insist on scheduling immediate motion hearing dates even though the action is in case management and despite the difficult and unusual circumstances surrounding the recusal of Justice Beaudoin.
22. The defendant responded by writing to Regional Senior Justice Hackland on June 25, 2012, and raised several issues that needed to be addressed before any further motions were heard in the action, including a request for time to file the instant motion.
23. On a motion hearing of July 27, 2012, the newly assigned case management judge, Justice Robert Smith, refused to adjourn the continuing refusals motion, initiated under Justice Beaudoin, in the defendant's maintenance and champerty motion to allow the defendant time to bring the instant motion. The defendant proceeded but in protest. The refusals motion hearing is continuing in writing, with stringent deadlines set by Justice Smith.

24. A motion hearing before Justice Smith was also held on July 26, 2012, in the absence of the defendant. Its relevance to the instant motion will be argued after the transcript is obtained.

Grounds for reasonable apprehension of bias

25. In case conferences prior to June 20, 2012, Justice Beaudoin made statements and/or determinations and/or findings that, in the complete circumstances that have emerged, attract a reasonable apprehension of bias.
26. In the hearing of June 20, 2012, and in prior hearings (case conferences), Justice Beaudoin made statements and/or findings and/or determinations that show a reasonable apprehension of bias.
27. As one particular, the June 20, 2012 findings of credibility of the defendant were contrary to the defendant's affidavit evidence that was not cross-examined, and were made in the absence of any counter evidence properly before the court.
28. As one particular, on June 20, 2012 Justice Beaudoin did not allow a recent University of Ottawa affiant to be cross-examined by the defendant, despite the defendant's evidence properly before the Court and that was not challenged by cross-examination, that the University's affidavit was in doubt.
29. On June 20, 2012 Justice Beaudoin ruled the defendant's expert's affidavit (of Certified Professional Engineer and LSUC member lawyer, Louis Beliveau) to be inadmissible on technical grounds (a late signed Form 53, brought to court that day; and no attached Curriculum Vita), and on grounds supported only by plaintiff's counsel's arguments that were contrary to the said affidavit expert evidence which had not been challenged by cross-examination. The expert's evidence was to be used to question the credibility and involvement of Allan Rock, the president of the University of Ottawa, which would impact the University's reputation and image.
30. Overall, the June 20, 2012 rulings of Justice Beaudoin on the defendant's refusals motion appear as a pattern of systematic shielding of the University of Ottawa witnesses and affiants from the defendant's questions, where most of the questions speak to motives and could thereby potentially impact the University's image and reputation.
31. In the hearing of July 24, 2012, the transcript will show that Justice Beaudoin made statements that confirm a reasonable apprehension of bias. Justice Beaudoin also stated the existence of a contract between himself and the University of Ottawa.
32. The contract is a "terms of reference for an endowed fund" at a public university and names Justice Robert Beaudoin as the Donor contact for the donor party. The endowed scholarship fund is in the name of Justice Beaudoin's late son.
33. One of the refusals issues in the defendant's refusals motion in the maintenance and champerty motion that was before Justice Beaudoin concerns a letter to the defendant from Mr. David W.

Scott, Co-Chairperson of the BLG law firm, and this refusals issue is the object of the University's affiant that was not allowed to be cross-examined by the defendant, in a June 20, 2012 ruling from the bench of Justice Beaudoin. The above-noted *Ottawa Citizen* article of April 24, 2012 reports that BLG has named a boardroom in honour of Justice Beaudoin's late son and that this is important to Justice Beaudoin.

34. The University of Ottawa is represented by BLG in the defendant's maintenance and champerty motion where it was granted intervener status by Justice Beaudoin.
35. Image and reputation are a common feature which link Justice Beaudoin's media published efforts to preserve the memory of his son and to build his late son's legacy with a University of Ottawa scholarship fund on the one hand, with the accusation of maintenance and champerty against the University of Ottawa on the other hand. The scholarship's prestige is tied to the image and reputation of the University, which in turn is potentially impacted by the decisions in the maintenance and champerty motion.
36. As such, there is an appearance that Justice Beaudoin has a common interest with the University of Ottawa to not allow probing questions of motive (for the maintenance) in the defendant's refusals motion and to not find maintenance or champerty.
37. The scholarship fund invites donations and the "The University of Ottawa may invest the capital as it sees fit" (terms of reference). Donations both depend on reputation and image of the University and assure the longevity and status of the Endowed Fund named after Justice Beaudoin's late son.
38. The terms of reference of the university scholarship fund are accessible to the public and show an active contract with Justice Beaudoin regarding future circumstances that may impact the fund's use.
39. Therefore, there is an appearance that Justice Beaudoin had an interest in the outcome of the champerty motion and/or a relevant interest in its subject matter.
40. Justice Beaudoin did not disclose the scholarship fund or the BLG boardroom.

Other specific grounds for the motion

41. Rules 1.04, 4.1, 34, 34.10, 37, 39, 53.03, 57, 58, and 77 of the Rules of Civil Procedure;
42. Such further and other grounds as the Defendant may advise and this Honourable Court deems just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of Denis Rancourt affirmed on July 30, 2012; and
2. The transcripts of case conferences with Justice Beaudoin that the defendant files; and
3. The transcript of the June 20, 2012 court hearing with Justice Beaudoin; and
4. The transcript of the July 24, 2012 court hearing with Justice Beaudoin; and
5. The transcript of the July 26, 2012 court hearing with Justice Smith (defendant was absent from the hearing); and
6. The transcript of the July 27, 2012 court hearing with Justice Smith; and
7. The defendant's motion record and factum in the defendant's refusals motion in the maintenance and champerty motion; and
8. The letters to Regional Senior Justice Hackland (plaintiff's letters of July 24 and 25, 2012; defendant's letter of July 25, 2012); and
9. Communications between the defendant and the plaintiff's counsel and/or counsel for the University of Ottawa as the Defendant may advise and this Honourable Court may permit.
10. Such further and other evidence as the Defendant may advise and this Honourable Court may permit.

DATED: July 30, 2012

Denis Rancourt
Defendant

TO: Richard G. Dearden
Counsel for the Plaintiff
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

AND TO: Peter Doody
Counsel for the University of Ottawa
BLG, Ottawa
100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

TAB F

File number: _____

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ONTARIO SUPERIOR COURT OF JUSTICE)**

BETWEEN:

Denis RancourtApplicant
(Defendant)

and

Joanne St. LewisRespondent
(Plaintiff)

and

University of OttawaRespondent
(Intervening Party)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that Denis Rancourt hereby applies for leave to appeal to the Court, pursuant to s. 40(1) of the *Supreme Court Act*, from the judgment of the *Ontario Superior Court of Justice* in file number 11-51657 made on November 29, 2012, or such further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

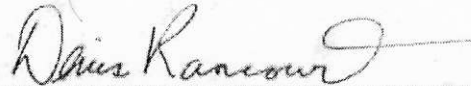
1. The judgement of the Ontario Superior Court of Justice raises the following questions which are of national importance:
 - (i) Does s. 15(1) of the *Charter* encompass a right for every individual litigant to an impartial process, both real and apparent?
 - (ii) Does the common law principle of “automatic disqualification” apply in Canada, and, if so, what form does it take?
 - (iii) Is Rule 62.02 of the *Ontario Rules of Civil Procedure* unconstitutional, in that it permits a complaint of bias to be finally barred at the court of first instance

without a hearing on merits, and, by extension:

- (a) Does a court of first instance have an obligation to hear a complaint of bias on merits; and
- (b) What test should apply for granting leave to appeal at first instance, in circumstances involving a reasonable apprehension of bias?

Dated at the City of Ottawa in the Province of Ontario this 4TH day of January, 2013.

SIGNED BY:



Denis Rancourt (Applicant)

ORIGINAL TO: THE REGISTRAR

COPIES TO: Counsel for the Respondent (Plaintiff)

Richard Dearden, Gowlings law firm
Suite 2600, 160 Elgin Street, Ottawa, ON K1P 1C3
Tel. 613-786-0135
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Counsel for the Respondent (Intervening Party)

Peter Doody, BLG law firm
Suite 1100, 100 Queen Street, Ottawa, ON K1P 1J9
Tel. 613-237-5160
Fax. 613-230-8842
Email: pdoody@blg.com

NOTICE TO THE RESPONDENTS: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the Supreme Court Act.

TAB G

Court File No.: _____

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWISPlaintiff
(Respondent)

and

DENIS RANCOURTDefendant
(Appellant)

NOTICE OF APPEAL(Appeal from the order of Justice Robert Smith, dated March 13, 2013)

April 12, 2013

Denis Rancourt
(Appellant)

THE DEFENDANT, DR. DENIS RANCOURT, APPEALS to the Court of Appeal from the order (Reasons For Decision On The Champerty Motion) of Mr. Justice Robert Smith, dated March 13, 2013, made at Ottawa, Ontario. Smith J. dismissed the defendant's motion to stay or dismiss the action on the grounds of abuse of process (maintenance and champerty).

THE APPELLANT ASKS that the judgment be set aside and a judgment be granted as follows:

1. Ordering re-hearing of the entire defendant's motion ("champerty motion"), including the defendant's refusals motion in the champerty motion, with the champerty motion treated as a trial;
2. In the alternative, granting the defendant's champerty motion to dismiss the action;
3. In the alternative, granting the defendant's champerty motion to terminate the champertous maintenance and forbid sharing in the proceeds of the action;

Costs and other

4. The costs of the motions set aside by this Honourable Court;
5. The costs of this appeal on an appropriate scale;
6. Such further and other relief as the appellant may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

OVERVIEW

1. This appeal raises fundamental questions about:
 - (a) a litigant's right to a judicial determination of apparent bias in a process leading to a final decision;
 - (b) what constitutes a fair hearing regarding time limitation for a self-represented litigant in a motion to end the action;
 - (c) the tests and factors for determining maintenance and/or champerty, where non-party funding is not needed for access to justice by the litigant;
 - (d) a motion judge's duty in determining relevancy and admissibility of the evidence, in a motion that can end the action; and
 - (e) the test for directing trial of an issue in an abuse of process motion to end the action.
2. The appellant has, since 2007, published a blog (the "U of O Watch" blog) which is critical of the University of Ottawa, and of its management, including the university president Allan Rock. The blog articles, based in documentary sources, are direct, and carry sting.
3. The appellant was a tenured Full Professor of physics at the University of Ottawa until 2009 when he was dismissed by Mr. Rock. The dismissal is being challenged in on-going binding labour arbitration by the appellant's union, for breach of the appellant's academic freedom.
4. In 2011, the respondent Ms. Joanne St. Lewis, a tenured Assistant Professor in law at the University of Ottawa, filed a \$1 million defamation lawsuit against the appellant for one of his 2011 blog posts in which the appellant states that access to information documents suggest that Professor St. Lewis acted like the house negro of Mr. Rock, where the term "house negro" was explicitly defined according to Malcolm X's iconic 1963 speech "Message to the Grass Roots".

5. Months into the action, the defendant learned that the University of Ottawa is entirely funding the respondent's litigation, in which the Statement of Claim foresees sharing in the proceeds of the action with the University of Ottawa. The appellant filed a motion to stay or dismiss the action for abuse of process, based on maintenance and champerty ("champerty motion"). Next, the action was put into case management by consent, and at the first case conference the University was made a responding party in the champerty motion.
6. The appellant cross-examined several affiants and witnesses for his champerty motion, including the president, the dean of the law faculty, and the chair of the board of governors of the University of Ottawa. This was followed by an appellant's refusals and productions motion resulting from the cross-examinations.
7. During the refusals motion hearings, the appellant discovered that the refusals motions and case management judge, Mr. Justice Robert Beaudoin, had a financial contract with the University of Ottawa, and a personal interest in the BLG law firm which represented the University. The appellant sought a judicial determination of reasonable apprehension of bias: Beaudoin J. recused himself for a given reason other than apparent bias, and stated that he could not be impartial moving forward. The defendant sought a judicial determination of apparent bias through motions, but the lower court circumvented providing any judicial determination of reasonable apprehension of bias of Beaudoin J.
8. A new case management judge was named, Mr. Justice Robert Smith, who continued the refusals motion(s), and heard and determined the champerty motion. Smith J. in the impugned decision relies extensively on a refusals motion decision of Beaudoin J., which was released after Beaudoin J. recused himself by finding that he could not be impartial moving forward.

REASONABLE APPREHENSION OF BIAS

9. The first ground for appeal is reasonable apprehension of bias. The appellant asks that this Honourable Court find that there is apparent bias of Mr. Justice Beaudoin, and that, consequently, the entire champerty motion and refusals motion must be re-heard *de novo*, including the case management decisions of Beaudoin J. regarding imposed cross-examinations scheduling constraints.

10. The cogent evidence supporting a reasonable apprehension of bias includes :
 - (a) A terms of reference contract for a law faculty scholarship endowment fund between Beaudoin J. and the University of Ottawa, an intervening party;
 - (b) A boardroom named in honour of Beaudoin J.'s deceased son, at the law firm representing the University of Ottawa;
 - (c) A newspaper article quoting Beaudoin J. expressing the personal and emotional importance to him of the said scholarship fund and of the said boardroom honour;
 - (d) The fact that, at the hearing where the bias concern was first raised, Beaudoin J. threatened the applicant with contempt of court if the applicant continued to advance the concern.

11. The cogent evidence supporting an appearance of bias occurred in circumstances where:
 - (a) Beaudoin J. had not disclosed his ties to the intervener, the University of Ottawa, and to its counsel; and
 - (b) the champerty motion in issue alleged bad faith of the University, such that the decisions of Beaudoin J. in the champerty motion could impact the reputation of the University and its scholarships; and
 - (c) consequently, there is a reasonable appearance that Beaudoin J. had a shared interest in the outcome of the champerty motion.

12. In the alternative, the order of Beaudoin J., on the part of the refusals motion decided by him, is invalid because it was made after Beaudoin J. recused himself by finding that he

could not be impartial regarding the appellant moving forward, which itself creates an inescapable appearance of bias.

13. This August 2, 2012 order of Beaudoin J. has two deleterious effects:
 - (a) it deprives the appellant of the answers and documents from the the refused questions of the witnesses; and
 - (b) it makes a determination of a limited field of relevancy for evidence in the champerty motion, which Smith J. adopted in his determination of the champerty motion, and in deciding on admissibility of affidavits.

DEFENDANT WAS DEPRIVED OF A FAIR HEARING

14. Smith J. erred by depriving the defendant of adequate time to make his oral arguments.
15. Smith J. erred by imposing a strict time management regiment, at the hearing of a motion to end the action, upon an inexperienced non-lawyer self-represented litigant who prepared all his own motion materials, and did not receive any legal help, while being opposed by two of Canada's leading lawyers who have both represented former or actual prime ministers of Canada.
16. Smith J. erred by imposing a strict time limit of one day for the hearing, over the objections and protest of the defendant, while not adjusting this time limit to two new preliminary issues which needed to be heard:
 - (a) A defendant's request to adjourn in order to allow a notice for leave to appeal to the Supreme Court of Canada to be filed, a matter that was ruled on in one hour; and
 - (b) A defendant's request that the main motion be directed into trial of an issue, a matter which consumed the defendant's remaining allotted time.
17. Smith J. erred by refusing to allow the defendant time for an oral argument regarding admissibility of an affidavit that was submitted after cross-examinations, and by imposing

that the entire hearing of the motion would be completed in the absence of a ruling on admissibility of the affidavits.

18. Smith J. erred by refusing to allow the defendant time to make his oral argument regarding the main motion, while only being allowed a short reply to the submissions of the others parties, thereby depriving the defendant of natural justice and procedural fairness.
19. Smith J. erred by not duly considering the prejudice against the self-represented defendant that could arise from being deprived of his oral arguments, and by not allowing the defendant to make submissions about the said prejudice.
20. Smith J. erred by refusing to rule on the question of trial of an issue prior to continuing the main motion, thereby creating a fait accompli.

JUDGE MISDIRECTED HIMSELF ON THE LAW OF MAINTENANCE AND CHAMPERTY

21. Smith J. erred by not following the binding Supreme Court of Canada definition of maintenance as consisting of intervening officiously or improperly, and as requiring a valid excuse, such as charity. A dictionary definition of officiously is "Marked by excessive eagerness in offering unwanted services or advice to others". Smith J. failed to consider officiousness, nor was a test for officiousness applied. Instead, the judge conflated officiousness with impropriety.
22. Smith J. erred by failing to consider, as argued by the defendant, that maintenance alone, without champerty, can give rise to an abuse of process which can end an action.
23. Smith J. erred by failing to consider the maintained litigant's prior intent to litigate, which is a determinative factor in finding officious interference, and maintenance. Smith J. said nothing about the evidence that the plaintiff did not, for years, have an intent to litigate until after she was eagerly offered and guaranteed unlimited funding for the lawsuit, in April 2011.

24. Smith J. erred by failing to turn his attention to the proposition that, beyond “prior intent”, the maintained litigant’s motives for agreeing to being funded and/or for seeking funding can be improper, and that this is a determinative factor in finding maintenance. Smith J. said nothing about the evidence that the maintained litigant’s (the plaintiff’s) motives were improper.
25. Smith J. erred by using a meaning of the term “trafficking in litigation” which is too limited for the factual context, and which is not consistent with the body of relevant case law. The judge’s adopted meaning of “trafficking in litigation” would render the Ontario statute *An Act respecting Champerty*, and the principle of champerty itself, meaningless in most factual circumstances, including where there is officious interference (maintenance) and sharing of the proceeds.
26. Smith J. erred by failing to consider that if maintenance is established, and there is a sharing of the proceeds of the litigation, then there is champerty, even if the maintainer’s dominant motive for the maintenance is not the sharing in the proceeds.
27. Smith J. erred by failing to apply the Ontario statute *An Act respecting Champerty*, which stipulates “All champertous agreements are forbidden, and invalid.”
28. Smith J. erred by not considering or determining the defendant’s requested order: “Alternatively, that the champertous maintenance be ordered terminated, with reimbursement of funds from the plaintiff to the University, and that the punitive damages paragraphs in the Statement of Claim be struck out.” The said punitive damages paragraphs stipulate that half of the punitive damages will be given to the University.

JUDGE MISDIRECTED HIMSELF ON ADMISSIBILITY OF EVIDENCE

29. Smith J. erred by adopting Beaudoin J.’s reasons, regarding relevancy for upholding refusals in the refusals motion, as defining relevancy for his purpose in determining evidence admissibility in the main motion. Smith J. was not bound by Beaudoin J.’s reasons for judging refusals, but rather had a duty to determine relevancy based on the

pleadings in the main motion before him, which in a motion includes all the supporting affidavits.

30. In adopting Beaudoin J.'s reasons regarding relevancy, Smith J. erred by failing to recognize that:
 - (a) It is the order of the Court which is binding, not the reasons assigned for making it; and
 - (b) Beaudoin J. did not intend to bind the hand of the judge hearing the main motion regarding admissibility of evidence, and did not have the jurisdiction to usurp the function of the judge hearing the main motion.
31. Smith J. erred by not applying all the factors needed to determine maintenance and champerty. Namely, the judge was bound to a detailed examination of motives, of both the maintainer, and the maintained litigant.
32. Smith J. erred by failing to consider documentary evidence not in the affidavits, but in the motion record, and which had been provided by a witness pursuant to a Notice of Examination. The test for admissibility must be applied, and a self-represented litigant should not be deprived of evidence for a technicality. The judge said nothing about the existence of this evidence.
33. Smith J. erred by failing to consider evidence in the cross-examination transcript of dean of law Mr. Feldthusen, which helped the appellant's case, and had been argued by the appellant. The judge said nothing about the existence of this evidence.
34. Smith J. erred by failing to consider evidence in the cross-examination transcript chair of the Board of Governors Mr. Giroux, which helped the appellant's case, and had been argued by the appellant. The judge said nothing about the existence of this evidence.
35. Smith J. erred by failing to consider the documentary evidence (several documents) that the plaintiff did not have a prior intent to litigate prior to being offered complete funding

by university president Mr. Rock on April 15, 2011. The judge said nothing about the existence of this evidence, which had been presented by the appellant.

36. Smith J. erred by finding the entire April 23, 2012 affidavit inadmissible which contained exhibits at cross-examination which had been identified by the witness (Mr. Rock), thereby effectively finding those exhibits inadmissible, without making any mention that the said exhibits were actually in evidence.
37. Smith J. erred by finding the entire April 23, 2012 affidavit inadmissible which contained documents provided by the plaintiff in discovery (Schedule A documents), thereby effectively finding those documents inadmissible, without applying the test for admissibility in motions of evidence provided in discovery, and without considering that there could be no prejudice to the plaintiff, and that a self-represented litigant should not be deprived of evidence based on a technicality.
38. In particular, two documents from discovery are of central importance to a determination of the plaintiff's prior intent and motives regarding maintenance and abuse of process:
 - (a) An email sent by the plaintiff to president Mr. Rock, about the 2011 blogpost complained of, which states: "Do let me know if you want me to do anything. I will be happy to fit into whatever strategy you decide but until then I intend to make no comment."; and
 - (b) An email from a Ms. Tarachansky to the plaintiff, received by the plaintiff prior to the plaintiff's email to Mr. Rock, which has Ms. Tarachansky stating about the said 2011 blogpost complained of: "... he refers to you in derogatory and racist language is really disturbing ... I'm sorry that you have been forced to endure such a disgusting attack."
39. Smith J. erred by not recognizing that, since one of the two supplementary affidavits (the April 23, 2012 affidavit) had been judicially approved to be submitted, the plaintiff had the onus to show that it was not admissible, and erred by finding it not admissible.

40. Smith J. erred by finding, contrary to all the documentary and sworn evidence before him, that:
 - (a) "Rancourt has not provided any reasonable or adequate explanation for why the evidence ... was not included in his affidavit and materials filed in January 2012"; and
 - (b) "these materials were in his possession before he cross-examined President Rock".
41. Smith J. erred by not admitting the evidence submitted by the applicant.
42. Smith J. erred by misdirecting himself on the nature of the evidence contained in the two supplementary affidavits, in finding that "even if [the affidavits] were admissible they do not constitute relevant evidence of an improper motive of the University but are mere speculation", in particular since:
 - (a) much of the evidence is about the improper motive (prior intent) of the maintained litigant, the plaintiff, not about the motive of Mr. Rock or the University; and
 - (b) the documentary evidence contains more than negative expression, but also an email exchange between university president Mr. Rock and the other main player dean of law Mr. Feldthusen explicitly showing a conspiracy to harm the appellant.

JUDGE ERRED BY FAILING TO DIRECT TRIAL OF AN ISSUE

43. Smith J. erred by incorrectly applying the test for trial of an issue, and/or by applying the wrong test. There is no reason for a litigant to request or the motion judge to direct a trial of an issue on a motion prior to the evidence being known and admitted.
44. Smith J. erred by misdirecting himself on the evidence and/or failing to consider material evidence, and by failing to find that there is material conflict in the evidence which requires a trial of an issue.
45. Examples of material conflicts in the evidence include the following.

46. Conflict in the evidence:

- (a) Both the plaintiff and Mr. Rock swear that the plaintiff expressed a firm intent to make a lawsuit against the defendant at an April 15, 2011 meeting, and that funding for the lawsuit was granted by Mr. Rock at the said meeting; whereas
- (b) Dean of law Mr. Feldthusen swore, spontaneously and without looking at his affidavit, that it “would be an over-estimate” that “Professor St. Lewis by this time [April 15, 2011 meeting] had decided firmly that she was going to litigate this matter”, and swore that no firm decision for funding was communicated by Mr. Rock at the said April 15, 2011 meeting; and, whereas
- (c) In her affidavit, the plaintiff swore that she made the decision to litigate “as soon as I read the Defendant’s “house negro” article”; and
- (d) The plaintiff in cross-examination swore that she first read the said “house negro” article after her counsel Mr. Dearden instructed her to do so, and that such instruction came after April 15, 2011; where
- (e) Smith J. said nothing about this pivotal conflict of admitted evidence in his Reasons, despite being strenuously argued by the defendant.

47. Conflict in the evidence:

- (a) President Mr. Rock testified that his motives, for funding the maintained litigant’s defamation lawsuit against the defendant, are proper; whereas
- (b) A five-part email exchange shows dean of law Mr. Feldthusen, who urged that the University must fund the lawsuit and who suggested the counsel for the plaintiff, and Mr. Rock together conspiring to find an actor(s) to “circulate a response to this fiction ... It is important for the members of the community to know that: 1. Far from having had “an impeccable pedagogic career”, Rancourt has ...”; and where
- (c) Smith J. said nothing about this email exchange, authenticated by Mr. Rock as an exhibit in his cross-examination, in the impugned Reasons, despite being strenuously argued by the defendant.

48. Conflict in the evidence:

- (a) Mr. Rock swore in testimony that the defendant's U of O Watch blogposts have no effect on him and that he probably has never read the blog; whereas
- (b) An email from Mr. Rock to his communications staff refers to the writings of the defendant as "toxic rants" and asks how to address media which pick up these "toxic rants"; where
- (c) Smith J. said nothing specific about the "toxic rants" email, which was authenticated by Mr. Rock as an exhibit at his cross-examination, despite its relevance having been strenuously argued by the defendant.

49. Conflict in the evidence:

- (a) The plaintiff swears to having developed a firm conviction to sue the defendant, immediately prior to securing complete funding for her lawsuit from the University on April 15, 2011; whereas
- (b) The plaintiff was aware in 2008 of the article on the U of O Watch blog which made all the same professional and personal criticisms of the plaintiff as the 2011 blog article complained off; where
- (c) Smith J. said nothing about the admitted evidence consisting of the 2008 blog article in his Reasons, despite this being strenuously argued by the defendant.

NOTE: INTENT TO FILE A MOTION FOR FRESH EVIDENCE

50. The appellant intends to file a motion for fresh evidence to this Honourable Court.

51. It is anticipated that the fresh evidence will include evidence that the plaintiff's funded lawsuit is aimed solely at targeting the defendant, whereas several over persons have made the same, other, and similar more widely published statements about the plaintiff.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Subsection 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
2. The order appealed from is a final order;
3. Leave to appeal is not required; and
4. *Aacon Buildings v. City of Brampton*, 2010 ONCA 773 (CanLII)

DATED: April 12, 2013

Denis Rancourt
Appellant

TO: Richard G. Dearden
Counsel for the Plaintiff
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

AND TO: Peter Doody
Counsel for the University of Ottawa
BLG, Ottawa
100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

TAB 4

TAB A

Case Name:

Bailey v. Barbour

Between

**Angelina Bailey, Claimant (Appellant), and
Gerald Harry Barbour, Objector (Respondent)**

[2012] O.J. No. 2178

2012 ONCA 325

17 R.P.R. (5th) 49

21 C.P.C. (7th) 260

291 O.A.C. 344

110 O.R. (3d) 161

216 A.C.W.S. (3d) 492

2012 CarswellOnt 6026

Docket: C55105

Ontario Court of Appeal
Toronto, Ontario

R.G. Juriansz, H.S. LaForme and E.W. Ducharme JJ.A.

Heard: April 18, 2012.

Judgment: May 16, 2012.

(28 paras.)

*Legal profession -- Judges -- Disqualification or removal -- Bias, reasonable apprehension of --
Conflict of interest -- Appeal by Bailey from judgment sustaining Barbour's objection to her claim
for possessory title allowed -- Parties were involved in protracted proceedings to determine respec-
tive rights to waterfront properties -- Prior to hearing, trial judge disclosed his wife's involvement
in waterfront real estate and her clients' connection to prior proceedings involving parties -- Trial*

judge refused request for recusal on basis that wife's involvement was an attenuated connection -- Reasonable apprehension of bias existed and required new trial before new judge, as wife's connection was deep, multi-layered and current given clients' connection to parties and likelihood of client appearing as witness.

Professional responsibility -- Independence -- Conflicts of interest -- Self-governing professions -- Professions -- Legal -- Judges -- Appeal by Bailey from judgment sustaining Barbour's objection to her claim for possessory title allowed -- Parties were involved in protracted proceedings to determine respective rights to waterfront properties -- Prior to hearing, trial judge disclosed his wife's involvement in waterfront real estate and her clients' connection to prior proceedings involving parties -- Trial judge refused request for recusal on basis that wife's involvement was an attenuated connection -- Reasonable apprehension of bias existed and required new trial before new judge, as wife's connection was deep, multi-layered and current given clients' connection to parties and likelihood of client appearing as witness.

Appeal by Bailey from a judgment sustaining Barbour's objection to her claim for possessory title to a narrow access route across the Barbour property to Bailey's island property. The parties were engaged in protracted proceedings to determine their respective rights to two waterfront properties. In 2010, the Deputy Director of Titles found Barbour's objection invalid and granted Bailey possessory title to the disputed access route. Barbour appealed and the hearing proceeded as a trial de novo over 19 days. The trial judge ultimately set aside the decision of the Deputy Director. At the outset of the hearing, the trial judge alerted counsel to a potential conflict of interest based on his wife's role as a realtor specializing in waterfront property in the same township, and their ownership of waterfront property in the area. In addition, the judge disclosed that the family of his wife's clients included neighbours who had joined Bailey in objecting to an earlier claim by Barbour in respect of the boundaries of his property. After a brief recess, Bailey asked the trial judge to recuse himself, as counsel indicated that the clients would likely be witnesses at trial and/or provide statutory declarations that would form part of the record. The trial judge declined the request on the basis that his wife's involvement was an attenuated connection that fell short of the threshold for recusal. Bailey's appeal raised eight issues, including a challenge to the recusal ruling.

HELD: Appeal allowed. The trial judge correctly identified the test to be applied for determining the existence of a reasonable apprehension of bias. Given the connections between the judge's wife to the people and the properties at the heart of the dispute, a reasonable apprehension of bias existed. One of the wife's clients was expected to be a witness at trial. Another client was the sister of the likely witness. The sisters were the daughters of Bailey's neighbour. The neighbour had joined Bailey as an objector to Barbour's earlier boundaries application and had testified on Bailey's behalf. In addition, statutory declarations by the family had been admitted in the proceeding before the Deputy Director. The wife's connection to the property was deep, current and multi-layered. The circumstances required a new trial before a different judge.

Statutes, Regulations and Rules Cited:

Boundaries Act, R.S.O. 1990, c. B.10

Land Titles Act, R.S.O. 1990, c. L.5, s. 46(2)

Appeal From:

On appeal from the judgment of Justice John R. McIsaac of the Superior Court of Justice dated June 24, 2011, with reasons reported at 2011 ONSC 4019, 8 R.P.R. (5th) 76.

Counsel:

Robert J. Fenn, Richard Rohmer (O.C.) Q.C., Izaak De Rijcke and Patrick M. Floyd, for the appellant.

Jeffrey Streisfield, for the respondent.

The following judgment was delivered by

THE COURT:--

A. OVERVIEW

1 The parties to this dispute have been battling for years over their respective rights to the waterfront properties they own on or near the shores of Georgian Bay in the township of Tiny in northern Simcoe County.

2 The appeal to this court is from the decision and order of McIsaac J. released June 24, 2011. In that decision, the trial judge set aside the decision of Deputy Director of Titles Rosenstein, dated February 9, 2010, following an application by the appellant Mrs. Bailey pursuant to s. 46(2) of the *Land Titles Act*, R.S.O. 1990, c. L.5. In the proceeding under the *Land Titles Act*, the Deputy Director of Titles found that the objection filed by the respondent Mr. Barbour was not valid, and granted to Mrs. Bailey possessory title to a portion of the parcel claimed by Mr. Barbour, a narrow access route across the Barbour property to Mrs. Bailey's property known as Tiny Island.

3 Mr. Barbour's appeal from the decision of the Deputy Director of Titles proceeded as a trial *de novo* before McIsaac J. and consumed 19 days. However, at its very outset, the trial judge alerted counsel to a potential conflict of interest and asked them to consider whether it caused either side any difficulty. Two short recesses followed, after each of which counsel for Mrs. Bailey respectfully asked the trial judge to recuse himself. The trial judge declined the request.

4 On this appeal, the appellant raises eight issues, the first of which is whether it was appropriate and necessary in the interests of justice for the judge to recuse himself. We begin with that issue.

B. FACTS RELEVANT TO THE ISSUE OF REASONABLE APPREHENSION OF BIAS

5 In raising the issue of possible conflict, the trial judge declared, among other things, that his wife is a real estate agent in Tiny Township where the properties of the parties are located, that she specializes in waterfront property, that she has a website titled "Shores of Tiny," and that among the clients she has had are Heidi Lauridsen and Rebecca Kynoch-Rice. In the discussion with counsel that followed, the trial judge added that he and his wife also own waterfront property in Tiny Township, and have a cottage there.

6 Ms. Lauridsen and Ms. Kynoch-Rice are daughters of the late Nancy Ann K. Rice, and nieces of the late Rebecca Van Aller, Mrs. Rice's sister. Mrs. Rice was a neighbour of the parties and well

I'd like to begin this ruling with reference to some general principles. A judge's impartiality is presumed and a party seeking disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias.

The question is what would an informed, reasonable and right-minded person viewing the matter realistically and practically, and having thought the matter through, conclude. Would he or she think it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly? The standard refers to an apprehension based on serious grounds. These principles come from the judgment of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259.

At its highest, the applicant's claim for disqualification is based on a general sense of unease because of the factors I announced earlier today in open court. In my view, this basis falls well short of the threshold that justifies the order sought. Accordingly, the application is dismissed. I reserve the right to expand upon these reasons.

15 The trial judge did not expand upon his ruling, and made no further reference to it in his reasons for judgment.

D. THE APPLICABLE LAW

16 The inquiry into whether a conflict exists sufficient to prompt a decision-maker to recuse him or herself must be fact-specific. As his short oral ruling demonstrates, the trial judge correctly identified the test to be applied for determining whether there exists a reasonable apprehension of bias: What would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would he or she think it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

17 This test was first articulated by Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394. Ever since, the Supreme Court of Canada has consistently endorsed the standard, including in the case referred to by the trial judge, *Wewaykum Indian Band*, although the court has also sought from time to time to clarify and develop it.

18 Thus, for example, in his reasons in *R. v. S. (R. D.)*, [1997] 3 S.C.R. 484, Cory J. explained, at para. 111, that the test set down by Grandpré J. contains a "two-fold objective element": not only must the person considering the alleged bias be reasonable, but "the apprehension of bias itself must also be reasonable in the circumstances of the case." Cory J. added, at para. 113, that:

[T]he threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

TAB B

**Geoffrey Saldanha, Leueen Saldanha and
Dominic Thivy** *Appellants*

v.

**Frederick H. Beals III and Patricia A.
Beals** *Respondents*

INDEXED AS: BEALS v. SALDANHA

Neutral citation: 2003 SCC 72.

File No.: 28829.

2003: February 20; 2003: December 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major,
Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

Conflict of laws — Foreign judgments — Enforcement — Action brought in Florida court over sale of Florida land valued at US\$8,000 — Florida court entering default judgment against defendants resident in Ontario — Jury subsequently awarding US\$210,000 in compensatory damages and US\$50,000 in punitive damages — Defendants not properly defending action according to Florida law and not moving to have default judgment set aside or appealing jury award for damages — Whether “real and substantial connection” test for enforcing interprovincial judgments should be extended to foreign judgments — Whether defence of fraud, public policy or natural justice established so that foreign judgment should not be enforced by Canadian courts — Whether enforcing foreign judgment constitutes violation of s. 7 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Fundamental justice — Whether s. 7 of Canadian Charter of Rights and Freedoms can shield a Canadian defendant from enforcement of foreign judgment.

Judgments and orders — Foreign judgments — Enforcement — Rules relating to recognition and

**Geoffrey Saldanha, Leueen Saldanha et
Dominic Thivy** *Appelants*

c.

**Frederick H. Beals III et Patricia A.
Beals** *Intimés*

RÉPERTORIÉ : BEALS c. SALDANHA

Référence neutre : 2003 CSC 72.

N° du greffe : 28829.

2003 : 20 février; 2003 : 18 décembre.

Présents : La juge en chef McLachlin et les juges
Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit international privé — Jugements étrangers — Exécution — Action intentée devant un tribunal de la Floride relativement à une vente de terrain pour la somme de 8 000 \$US — Tribunal de la Floride rendant un jugement par défaut contre des défendeurs résidant en Ontario — Jury accordant par la suite les sommes de 210 000 \$US à titre de dommages-intérêts compensatoires et de 50 000 \$US à titre de dommages-intérêts punitifs — Défaut des défendeurs de contester l'action correctement selon la loi de la Floride et de chercher à faire annuler le jugement par défaut ou de porter en appel l'attribution de dommages-intérêts par le jury — Le critère du « lien réel et substantiel », applicable à l'exécution des jugements d'une autre province, devrait-il également s'appliquer aux jugements étrangers? — A-t-on établi que le moyen de défense fondé sur la fraude, l'ordre public ou la justice naturelle s'applique de manière à empêcher les tribunaux canadiens d'exécuter le jugement étranger? — L'exécution du jugement étranger viole-t-elle l'art. 7 de la Charte canadienne des droits et libertés?

Droit constitutionnel — Charte des droits — Justice fondamentale — L'article 7 de la Charte canadienne des droits et libertés peut-il protéger un défendeur canadien contre l'exécution d'un jugement étranger?

Jugements et ordonnances — Jugements étrangers — Exécution — Règles relatives à la reconnaissance

enforcement of foreign judgments by Canadian courts — Nature and scope of defences available to judgment debtor.

The appellants, residents of Ontario, sold a vacant lot situated in Florida to the respondents. A dispute arose as a result of that transaction and in 1986 the respondents sued the appellants and two other defendants in Florida. A defence was filed but the appellants chose not to defend any of the subsequent amendments to the action. Pursuant to Florida law, the failure to defend the amendments had the effect of not defending the action. The appellants were subsequently noted in default and were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial. The jury awarded the respondents US\$210,000 in compensatory damages and US\$50,000 in punitive damages. Upon receipt of the notice of the monetary judgment against them, the appellants sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario. Relying on this advice, the appellants took no steps to have the judgment set aside or to appeal the judgment in Florida. The damages were not paid and an action was started in Ontario to enforce the Florida judgment. By the time of the hearing in 1998, the foreign judgment with interest had grown to approximately C\$800,000. The trial judge dismissed the action for enforcement primarily on the ground that there had been fraud in relation to the assessment of damages. The Court of Appeal allowed the respondents' appeal.

Held (Iacobucci, Binnie and LeBel JJ. dissenting): The appeal should be dismissed. The judgment of the Florida court should be enforced.

Per McLachlin C.J. and Gonthier, Major, Bastarache, Arbour and Deschamps JJ.: International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. Subject to the legislatures adopting a different approach, the "real and substantial connection" test, which has until now only been applied to interprovincial judgments, should apply equally to the recognition and enforcement of foreign judgments. The test requires that a significant connection exist between the cause of action and the foreign court. Here, the "real and substantial connection" test is made out. The appellants entered into a property transaction in Florida when they bought and sold land. As such, there

et à l'exécution d'un jugement étranger par les tribunaux canadiens — Nature et portée des moyens de défense dont dispose le débiteur judiciaire.

Les appelants, résidents ontariens, ont vendu aux intimés un terrain vague situé en Floride. Cette opération a engendré un différend et, en 1986, les intimés ont engagé, en Floride, des poursuites contre les appelants et deux autres défendeurs. Les appelants ont produit une défense, mais ils ont choisi de ne répondre à aucune des modifications subséquentement apportées à cette action. Selon la loi de la Floride, cette omission revenait à ne pas contester l'action. Le défaut des appelants a été, par la suite, constaté et ceux-ci ont reçu signification d'un avis les informant qu'un procès devant jury serait tenu dans le but d'établir le montant des dommages-intérêts. Ils n'ont ni répondu à cet avis ni assisté au procès. Le jury a accordé aux intimés les sommes de 210 000 \$US à titre de dommages-intérêts compensatoires et de 50 000 \$US à titre de dommages-intérêts punitifs. Les appelants ont sollicité des conseils juridiques aussitôt qu'ils furent avisés du montant qu'ils étaient condamnés à payer. Ils se sont fait dire par un avocat ontarien que ce jugement étranger était inexécutoire en Ontario. Forts de ce conseil, les appelants n'ont entrepris aucune démarche visant à faire annuler ce jugement ou à le porter en appel en Floride. Les dommages-intérêts n'ont pas été payés et une action en exécution du jugement rendu en Floride a été intentée en Ontario. Au moment de l'audition, en 1998, les dommages-intérêts accordés par le jugement étranger, et les intérêts accumulés, totalisaient environ 800 000 \$CAN. Le juge de première instance a rejeté l'action en exécution surtout pour cause de fraude dans l'évaluation des dommages-intérêts. La Cour d'appel a accueilli l'appel des intimés.

Arrêt (les juges Iacobucci, Binnie et LeBel sont dissidents) : Le pourvoi est rejeté. Le jugement du tribunal de la Floride doit être exécuté.

La juge en chef McLachlin et les juges Gonthier, Major, Bastarache, Arbour et Deschamps : La courtoisie internationale et la prédominance de la circulation et des opérations transfrontalières internationales commandent une modernisation du droit international privé. À moins que les législatures n'adoptent des lois prescrivant une approche différente, le critère du « lien réel et substantiel », jusqu'à maintenant limité aux jugements d'une autre province, devrait également s'appliquer à la reconnaissance et à l'exécution des jugements étrangers. Ce critère requiert l'existence d'un lien important entre la cause d'action et le tribunal étranger. En l'espèce, le critère du « lien réel et substantiel » est respecté. Les appelants ont conclu une opération immobilière en

exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants. Since the Florida court properly took jurisdiction, its judgment must be recognized and enforced by a domestic court provided that no defences bar its enforcement.

While fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment. The defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. Here, the defence of fraud is not made out. The appellants have not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. In the absence of such evidence, the trial judge erred in concluding that there was fraud. Although the amount of damages awarded may seem disproportionate, it was a palpable and overriding error for the trial judge to conclude on the dollar amount of the judgment alone that the Florida jury must have been misled.

The defence of natural justice is restricted to the form of the foreign procedure and to due process, and does not relate to the merits of the case. If that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof. In the circumstances of this case, the defence does not arise. The appellants failed to raise any reasonable apprehension of unfairness. They were fully informed about the Florida action, were advised of the case to meet and were granted a fair opportunity to do so. They did not defend the action. Once they received notice of the amount of the judgment, the appellants obviously had precise notice of the extent of their financial exposure. Their failure to move to set aside or appeal the Florida judgment when confronted with the size of the award of damages was not due to a lack of notice but due to their reliance upon negligent legal advice. That

Florida quand ils ont acheté et vendu le terrain. Il existe donc un lien tant réel que substantiel entre le ressort de la Floride, l'objet de l'action et les défendeurs. Vu que le tribunal de la Floride a exercé correctement sa compétence, un tribunal national se doit de reconnaître et d'exécuter le jugement qu'il a rendu, pourvu qu'aucun moyen de défense ne vienne en empêcher l'exécution.

Tandis que la fraude touchant la compétence peut toujours être invoquée devant un tribunal national pour attaquer la validité d'un jugement, la fraude ne peut être invoquée pour contester le bien-fondé d'un jugement étranger qu'en présence d'allégations nouvelles qui n'ont pas déjà été examinées et tranchées. Le tribunal national peut refuser de reconnaître le jugement si on lui soumet des faits substantiels impossibles à découvrir antérieurement et susceptibles de mettre en doute la preuve dont le tribunal étranger était saisi. Pour pouvoir invoquer le moyen de défense fondé sur la fraude, le défendeur doit démontrer qu'il n'était pas possible, en faisant montre de diligence raisonnable, de découvrir, avant le prononcé du jugement étranger, les faits maintenant invoqués. Dans la présente affaire, le moyen de défense fondé sur la fraude ne peut pas être invoqué. Les appelants n'ont pas allégué qu'il existait une preuve de fraude qu'ils n'auraient pas pu découvrir s'ils avaient contesté l'action intentée en Floride. En l'absence d'une telle preuve, le juge de première instance a commis une erreur en concluant à l'existence d'une fraude. Bien que le montant des dommages-intérêts accordés puisse paraître démesuré, il reste que le juge de première instance a commis une erreur manifeste et dominante en déduisant, du seul montant accordé par le jugement, que le jury de la Floride avait été induit en erreur.

Le moyen de défense fondé sur la justice naturelle est limité à la forme de la procédure étrangère et à l'application régulière de la loi, et n'a rien à voir avec le bien-fondé de l'affaire. L'exécution du jugement sera refusée dans le cas où, si valide qu'elle soit à l'étranger, la procédure suivie pour le rendre n'est pas conforme à la notion de justice naturelle canadienne. Le fardeau de la preuve incombe au défendeur. En l'espèce, le moyen de défense fondé sur la justice naturelle ne peut pas être invoqué. Les appelants n'ont suscité aucune crainte raisonnable d'injustice. Ils ont été très bien informés de l'action intentée en Floride; ils ont été avisés de la preuve à réfuter et ont eu une possibilité raisonnable de la réfuter. Ils n'ont pas contesté l'action. Il est évident que, lorsqu'ils ont reçu avis du montant accordé par le jugement, les appelants ont alors connu exactement l'ampleur du risque financier auquel ils étaient exposés. Leur défaut de chercher à faire annuler ou de porter en

negligence cannot be a bar to the enforcement of the respondents' judgment.

The public policy defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice, and turns on whether a foreign law is contrary to our view of basic morality. The award of damages by the Florida jury does not violate our principles of morality such that enforcement of the monetary judgment would shock the conscience of the reasonable Canadian. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.

Finally, the recognition and enforcement of the Florida judgment by a Canadian court would not constitute a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*. Given that s. 7 does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, it should not shield a Canadian defendant from the enforcement of a foreign judgment.

Per Iacobucci and Binnie JJ. (dissenting): The "real and substantial connection" test provides an appropriate conceptual basis for the enforcement of final judgments obtained in foreign jurisdictions. While there is no doubt the Florida courts had jurisdiction over the dispute since the land was located in that jurisdiction, the question is whether the appellants in this proceeding were sufficiently informed of the case against them to allow them to determine, in a reasonable way, whether to participate in the Florida action, or to let it go by default. In this case, the appellants come within the traditional limits of the natural justice defence and the Ontario courts ought not to give effect to the Florida judgment.

The suggestion that the appellants are the authors of their own misfortune on the basis that if they had hired

appel le jugement obtenu en Floride, face à l'importance du montant des dommages-intérêts accordés, est dû non pas à l'absence d'avis, mais plutôt au fait qu'ils ont suivi les conseils erronés de leur avocat. Ce défaut ne saurait faire obstacle à l'exécution du jugement obtenu par les intimés.

Le moyen de défense fondé sur l'ordre public empêche l'exécution d'un jugement étranger contraire à la notion de justice canadienne et oblige à déterminer si une loi étrangère est contraire à nos valeurs morales fondamentales. Le montant des dommages-intérêts accordés par le jury de la Floride ne fait pas entorse à nos principes au point que l'exécution du jugement l'accordant choquerait la conscience des Canadiens et des Canadiennes raisonnables. Malgré l'ampleur qu'elles ont prise, les sommes en question ne justifient pas, à elles seules, un refus d'exécuter le jugement étranger au Canada. Le moyen de défense fondé sur l'ordre public n'est pas destiné à empêcher l'exécution du jugement d'un tribunal étranger ayant un lien réel et substantiel avec la cause d'action, pour le seul motif que la demande présentée dans ce ressort étranger ne donnerait pas lieu à des dommages-intérêts comparables au Canada.

Enfin, la reconnaissance et l'exécution, par un tribunal canadien, du jugement rendu en Floride ne constituerait pas une violation de l'art. 7 de la *Charte canadienne des droits et libertés*. Vu que l'art. 7 ne protège pas un résident canadien contre les conséquences financières de l'exécution d'un jugement rendu par un tribunal canadien, il ne doit pas non plus protéger un défendeur canadien contre l'exécution d'un jugement étranger.

Les juges Iacobucci et Binnie (dissidents): Le critère du « lien réel et substantiel » fournit un fondement conceptuel approprié pour exécuter les jugements définitifs obtenus dans des ressorts étrangers. Bien qu'il ne fasse aucun doute que les tribunaux de la Floride étaient compétents pour régler le différend, vu que le terrain était situé dans ce ressort, il faut se demander si l'avis que les appelants en l'espèce ont reçu au sujet du risque auquel ils étaient exposés suffisait pour qu'ils soient en mesure de décider raisonnablement s'ils devaient participer à l'action intentée en Floride ou laisser le tribunal rendre jugement par défaut. Dans la présente affaire, les appelants satisfont aux conditions traditionnelles requises pour pouvoir invoquer la justice naturelle comme moyen de défense, et les tribunaux ontariens doivent s'abstenir de mettre à exécution le jugement de la Floride.

On ne saurait accepter que les appelants sont les artisans de leur malheur en ce sens que l'embauche

a Florida lawyer they would have found out about subsequent developments in the action cannot be accepted. The appellants decided not to defend the case set out against them in the complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

To make an informed decision, they should have been told in general terms of the case they had to meet on liability and been given an indication of the jeopardy they faced in terms of damages. The respondents' complaint did not adequately convey to the appellants the importance of the decision that would eventually be made in the Florida court.

Cumulatively, the events demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice. Nowhere was it brought to the appellants' attention that, under the *Florida Rules of Civil Procedure*, they were required to refile their defence every time the respondents amended their complaint against other defendants. In terms of procedural fairness, the appellants were entitled to assume that in the absence of any new allegations against them there was no need to refile a defence that had already been filed in the same action. A Canadian resident is not presumed to know the law of another jurisdiction. As the basis of the respondents' judgment is default of pleading, this lack of notification goes to the heart of the present appeal.

Furthermore, a party must be made aware of the potential jeopardy faced. The appellants received no notice of a 1987 court order striking out the claim for punitive damages against the other defendants — the realtor and the title insurers — on grounds applicable, had they known about it, to the appellants. They were also not told, after being noted in default and before the jury trial, that the respondents had made a deal with the realtor to delete claims against the realtor for treble damages, punitive damages and statutory violations (though these claims were continued on almost identical facts against the appellants). Subsequently, the respondents settled with the realtor and with the title insurers, leaving the appellants as the sole target at the damages trial. They were not told about this. Nor were the appellants served with the court order for mandatory mediation which provided that all parties were required to participate or, as required by the Florida rules, with notice of the experts the respondents proposed to call at the damages assessment. Lastly, the respondents' complaint did not indicate that they were claiming

d'un avocat en Floride leur aurait permis de prendre connaissance de l'évolution subséquente de l'action. Les appelants ont décidé de ne pas contester la preuve déposée contre eux dans la plainte. Cette preuve a été, par la suite, modifiée. Les appelants n'ont jamais eu la possibilité de prendre connaissance de la nouvelle preuve parce qu'on ne leur a jamais fait part de son existence.

Pour qu'ils soient en mesure de prendre une décision éclairée, on aurait dû les informer de la preuve générale qu'ils devaient réfuter et leur faire part des dommages-intérêts auxquels ils risquaient d'être condamnés. La plainte des intimés ne permettait pas aux appelants de saisir la gravité de la décision que pourrait rendre le tribunal de la Floride.

Tout bien considéré, ces événements témoignent d'une procédure inéquitable qui, en l'espèce, ne respectait pas les règles de justice naturelle. Les appelants n'ont jamais été informés que les *Rules of Civil Procedure* de la Floride les obligeaient à déposer de nouveau leur défense chaque fois que les intimés modifiaient leur plainte contre les autres défendeurs. Sur le plan de l'équité procédurale, les appelants étaient en droit de supposer qu'en l'absence de nouvelles allégations contre eux ils n'avaient pas à déposer de nouveau une défense déjà produite en réponse à la même action. Un résident canadien n'est pas présumé connaître la loi applicable dans un autre ressort. Comme le jugement obtenu par les intimés repose sur le défaut de produire un acte de procédure, cette absence d'avis est cruciale en l'espèce.

En outre, une partie doit être informée du risque auquel elle est exposée. Les appelants n'ont pas été avisés de l'ordonnance dans laquelle le tribunal a annulé, en 1987, la demande de dommages-intérêts punitifs présentée contre les autres défendeurs — l'agent immobilier et la société d'assurance de titres de propriété — pour des raisons qui auraient été applicables aux appelants, s'ils les avaient connues. Ils n'ont pas non plus été informés, après la constatation de leur défaut mais avant le procès devant jury, que les intimés et l'agent immobilier avaient convenu de supprimer les demandes de dommages-intérêts triples, de dommages-intérêts punitifs et d'indemnité pour violation de la loi déposées contre l'agent immobilier (même si ces demandes fondées sur des faits quasi identiques étaient maintenues contre les appelants). Par la suite, les intimés ont réglé à l'amiable avec l'agent immobilier et la société d'assurance de titres de propriétés, de sorte que les appelants sont retrouvés les seuls visés à l'audience relative aux dommages-intérêts. Les appelants n'ont pas été informés de ce changement

damages on behalf of corporations, whose names appeared nowhere in the pleadings, in which they had an interest, and that they would be seeking damages for a corporation's lost opportunity to build an undefined number of homes on land to which neither the respondents nor the corporation held title.

A judgment based on inadequate notice is violative of natural justice. A default judgment that rests on such an unfair foundation should not be enforced. The fact that the appellants did not appeal the Florida judgment or seek the indulgence of the Florida court to set the default judgment aside for "excusable neglect" is a relevant consideration, but is not necessarily fatal, and in this case does not justify the enforcement in Ontario of the flawed Florida default judgment.

Per LeBel J. (dissenting): The "real and substantial connection" test should be modified significantly when it is applied to judgments originating outside the Canadian federation. Specifically, the assessment of the propriety of the foreign court's jurisdiction should be carried out in a way that acknowledges the additional hardship imposed on a defendant who is required to litigate in a foreign country. The purposive, principled framework should not be confined, however, to the question of jurisdiction. The impeachment defences of public policy, fraud and natural justice ought to be reformulated. Liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach.

The jurisdiction test itself should be applied so that the assumption of jurisdiction will not be recognized if it is unfair to the defendant. This requires taking into account the differences between the international and interprovincial contexts. The integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity. It is also a constitutional imperative, inherent in the relationship between the units of our federal state, that each province must recognize the properly assumed jurisdiction of another, and conversely that no court in a province can intermeddle in matters that are without a constitutionally sufficient connection to that province.

de situation. Ils n'ont pas non plus reçu signification de l'ordonnance judiciaire de médiation obligatoire qui requerrait la participation de toutes les parties, ni été avisés — conformément aux règles de la Floride — des experts que les intimés comptaient appeler à témoigner lors de l'évaluation des dommages-intérêts. Enfin, la plainte des intimés n'indiquait pas qu'ils réclamaient des dommages-intérêts au nom de sociétés dont ils étaient actionnaires et dont les noms ne figuraient nulle part dans les actes de procédure, et qu'ils comptaient réclamer des dommages-intérêts pour la possibilité qu'une société avait perdue de construire un nombre indéterminé de maisons sur un terrain qui ne lui appartenait pas et qui n'appartenait pas non plus aux intimés.

Un jugement fondé sur un avis insuffisant est contraire à la justice naturelle. Il n'y a pas lieu d'exécuter un jugement par défaut ayant un fondement aussi inéquitable. Le fait que les appelants n'ont ni porté en appel le jugement rendu en Floride, ni demandé au tribunal de la Floride de faire montre d'indulgence en annulant pour cause de « négligence excusable » le jugement par défaut, est un facteur pertinent, mais non nécessairement fatal, qui, en l'espèce, ne justifie pas l'exécution en Ontario du jugement vicié rendu par défaut en Floride.

Le juge LeBel (dissident) : Il y a lieu de modifier sensiblement le critère du « lien réel et substantiel » lorsqu'il s'agit de l'appliquer à des jugements émanant de l'extérieur de la fédération canadienne. Plus précisément, l'évaluation de la légitimité de la compétence du tribunal étranger doit tenir compte des difficultés supplémentaires auxquelles se heurte le défendeur tenu de plaider dans un pays étranger. Cependant, le système téléologique et fondé sur des principes ne devrait pas se limiter à la question de la compétence. Il est souhaitable de reformuler les moyens de défense fondés sur l'ordre public, la fraude et la justice naturelle. Il est illogique de libéraliser le volet « compétence » de l'analyse tout en continuant de répartir le volet « moyens de défense » dans des catégories bien précises et assujetties à une interprétation stricte.

Le critère même de la compétence doit s'appliquer pour empêcher la reconnaissance de la déclaration de compétence qui est injuste pour la partie défenderesse. Cela exige de tenir compte des différences qui existent entre les contextes international et interprovincial. Le caractère unifié de la fédération canadienne commande, en fait, une large mesure de coopération entre les tribunaux des diverses provinces. De même, un impératif constitutionnel, inhérent au lien existant entre les éléments qui forment notre État fédéral, veut que chaque province reconnaisse la compétence qu'une autre province déclare avoir à juste titre et, à l'inverse, qu'aucun tribunal d'une province ne puisse s'immiscer dans des

Comity as between sovereign nations is not an obligation in the same sense. It follows from the contextual and purpose-driven approach that the rules for recognition and enforcement of foreign-country judgments should be carefully fashioned to reflect the realities of the international context, and calibrated to further to the greatest degree possible, the ultimate objective of facilitating international interactions. However, this does not mean that they should be as liberal as the interprovincial rule. Ideally, the "real and substantial connection" test should represent a balance designed to create the optimum conditions favouring the flow of commodities and services across state lines. The connections required before foreign-country judgments will be enforced should be specified more strictly and in a manner that gives due weight to the protection of Canadian defendants without disregarding the legitimate interests of foreign claimants. This approach is consistent with both the flexible nature of international comity as a principle of enlightened self-interest rather than absolute obligation, and the practical differences between the international and interprovincial contexts.

While the test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum, it does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he or she personally has no link at all to that jurisdiction. Under this approach, the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience, and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate. In extreme cases, the foreign legal system itself may be inherently unfair. If the process that led to the judgment was unfair in itself, it is not fair to the defendant to enforce that judgment in any circumstance, even if the forum has very strong connections to the action and appears in every other respect to be the natural place for the action to be heard.

affaires qui, sur le plan constitutionnel, n'ont aucun lien suffisant avec la province où il est situé. La courtoisie entre États souverains ne constitue pas une obligation dans le même sens. L'approche contextuelle et téléologique commande que les règles applicables en matière de reconnaissance et d'exécution des jugements étrangers reflètent fidèlement les réalités du contexte international et soient le plus possible adaptées à la réalisation de l'objectif final qui est de faciliter les relations internationales. Cependant, cela ne signifie pas qu'elles doivent être aussi libérales que la règle interprovinciale. Idéalement, le critère du « lien réel et substantiel » devrait représenter une solution de compromis destinée à créer les conditions les plus propices à la circulation des biens et des services d'un pays à l'autre. Les liens nécessaires à l'exécution des jugements étrangers doivent être précisés davantage de manière à donner à la protection des défendeurs canadiens toute l'importance qu'elle mérite, sans pour autant négliger les intérêts légitimes des demandeurs étrangers. Cette approche reste compatible avec la nature souple de la courtoisie internationale en tant que principe d'individualisme constructif et non en tant qu'obligation absolue, et avec les différences concrètes qui existent entre le contexte international et le contexte interprovincial.

Bien que ce critère doive contribuer à assurer que, compte tenu de l'ensemble des liens entre le ressort et tous les aspects de l'action, il n'est pas déraisonnable de s'attendre à ce que le défendeur y plaide, il ne s'ensuit pas nécessairement qu'un lien doit rattacher le défendeur au ressort. En effet, il arrive qu'en raison de ses autres liens avec l'instance le ressort soit un endroit raisonnable pour instruire l'action et que l'on puisse alors raisonnablement s'attendre à ce que le défendeur s'y rende même si, personnellement, il n'a absolument aucun lien avec ce ressort. Selon cette approche, le lien doit être assez solide pour que l'on puisse raisonnablement s'attendre à ce que le défendeur aille plaider devant ce tribunal malgré les dépenses supplémentaires, les inconvénients et le risque que cela peut lui occasionner. Dans le cas où il deviendrait très onéreux pour le défendeur de plaider dans le ressort étranger, la reconnaissance du caractère juste et approprié de la déclaration de compétence du tribunal d'origine exige la démonstration de l'existence d'un lien plus solide. Dans les pires cas, il se peut que le régime juridique étranger lui-même soit foncièrement inéquitable. Lorsque la procédure suivie pour rendre le jugement en cause était inéquitable en soi, il devient alors injuste d'imposer au défendeur l'exécution du jugement dans tous les cas, même si des liens très solides rattachent l'action au ressort et si ce dernier paraît être, à tous autres égards, l'endroit logique pour l'instruction de l'instance.

It follows from those propositions that the notion of interprovincial reciprocity is not equally applicable internationally. To treat a judgment from a foreign country exactly like one that originates within Canada fails to take into account the differences between the interprovincial and international contexts and fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. Lastly, s. 7 *Charter* rights are not usually relevant to jurisdictional issues in civil disputes and do not arise in this case, although it is possible that there may be situations where fundamental interests of the defendant are implicated and s. 7 could come into play.

In this case, Florida was the natural place for the action to be heard because there were very strong connections between that state and every component of the action: the plaintiffs, who live there; the land, which is in Florida; and the defendants, who involved themselves in real estate transactions there.

The public policy defence should be reserved for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness. Here, the defects in the judgment, while severe, do not engage the public policy defence. The enforcement of such a large award in the absence of a connection either to harm suffered by the plaintiffs and caused by the defendants or to conduct deserving of punishment on the part of the defendants would be contrary to basic Canadian ideas of justice. But there is no evidence that the law of Florida offends these principles. On the contrary, the record indicates that Florida law requires proof of damages in the usual fashion and there is no indication that punitive damages are available where the defendant's conduct is not morally blameworthy.

In general, the rule that the defence of fraud must be based on previously undiscoverable evidence is a reasonably balanced solution. However, the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one should not be ruled out. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil

Il découle de ces propositions que la notion de réciprocité interprovinciale ne s'applique tout autant aux jugements rendus à l'extérieur du Canada. Traiter un jugement émanant d'un pays étranger exactement sur le même pied qu'un jugement rendu au Canada ne tient pas compte des différences très réelles qui existent entre les contextes interprovincial et international, et ne reflète pas les différences entre la déclaration de compétence et l'exécution d'un jugement étranger. Enfin, les droits garantis par l'art. 7 de la *Charte* ne sont généralement pas pertinents relativement aux questions de compétence soulevées en matière civile et n'interviennent pas en l'espèce, quoiqu'il puisse y avoir des cas où les intérêts fondamentaux du défendeur sont en cause et où l'art. 7 entre alors en jeu.

En l'espèce, la Floride était l'endroit logique pour l'instruction de l'action en raison de l'existence de liens très solides entre cet État et chaque élément de l'action : les demandeurs y vivent, le terrain y est situé et les défendeurs y ont effectué des opérations immobilières.

Il y a lieu de continuer à limiter la possibilité d'invoquer le moyen de défense fondé sur l'ordre public aux cas où l'objection vise le droit applicable dans le ressort étranger et non la manière dont ce droit a été appliqué ou le montant même des dommages-intérêts qui a été accordé. Il doit également pouvoir être invoqué à l'encontre de lois étrangères violant les règles fondamentales de notre système de justice civile, qui sont largement reconnues comme étant essentiellement équitables. Dans la présente affaire, les vices du jugement, si graves soient-ils, ne donnent pas ouverture au moyen de défense fondé sur l'ordre public. À défaut d'un lien soit avec un préjudice causé aux demandeurs par les défendeurs, soit avec une conduite des défendeurs qui mérite d'être punie, l'exécution d'un jugement accordant un montant de dommages-intérêts aussi élevé serait contraire aux notions de justice fondamentales canadiennes. Cependant, rien ne prouve que le droit de la Floride viole ces principes. Au contraire, le dossier indique que le droit de la Floride exige que la preuve du préjudice soit faite de la manière habituelle, et rien n'indique qu'il est possible d'obtenir des dommages-intérêts punitifs lorsque la conduite du défendeur n'est pas moralement répréhensible.

En général, la règle voulant que le moyen de défense fondé sur la fraude ne puisse être invoqué qu'à la lumière d'éléments de preuve impossibles à découvrir antérieurement représente un juste milieu raisonnable. Toutefois, il n'y a pas lieu d'écarter la possibilité d'appliquer un critère plus large aux jugements par défaut dans les situations où la décision du défendeur de ne pas participer à l'instance était manifestement raisonnable. Dans le cas

standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts. Accordingly, a more generous version of the fraud defence ought to be available, as required, to address the dangers of abuse associated with the loosening of the jurisdiction test to admit a broad category of formerly unenforceable default judgments. In the present case, the defence of fraud is not made out. All the facts that the appellants raise in this connection were known to them or could have been discovered at the time of the Florida action. Furthermore, even though this is the kind of case for which a more lenient interpretation of the fraud defence would, in principle, be appropriate, because the appellants' decision not to attend the Florida proceedings was a reasonable one, given the lack of evidence, the defence could not succeed even on the view that the judgment could be vitiated by proof of intentional fraud.

The defence of natural justice concerns the procedure by which the foreign court reached its decision. If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice, then the foreign judgment should not be enforced. Two developments should be recognized in connection with this defence: the requirements of notice and a hearing should be construed in a purposive and flexible manner, and substantive principles of justice should also be included in the scope of the defence. Notice is adequate when the defendant is given enough information to assess the extent of his or her jeopardy. This means, among other things, that the defendant should be made aware of the approximate amount sought. Adequate notice must also include alerting the defendant to the consequences of any procedural steps taken or not taken, as well as to the allegations that will be adjudicated at trial. In assessing whether the defence of natural justice has been made out, the opportunities for correcting a denial of natural justice that existed in the originating jurisdiction should be assessed in light of all the relevant factors. Here, the Ontario defendants were not given sufficient notice of the extent and nature of the claims against them in the Florida action and its potential ramifications. Furthermore, there was no notice as to the serious consequences to the defendants of failure to refile their defence in response to the

où le défendeur n'a pas réagi à ce qu'il considérait, à juste titre, comme étant une demande futile et dénuée de fondement, et où il peut prouver, selon la norme applicable en matière civile, que le demandeur a profité de son absence pour délibérément induire en erreur le tribunal étranger, on serait malvenu de soutenir qu'un tribunal canadien saisi d'une demande d'exécution du jugement qui a résulté doit fermer les yeux sur ces faits. Par conséquent, une version plus généreuse du moyen de défense fondé sur la fraude devrait pouvoir être invoquée lorsque cela s'avère nécessaire pour réduire les risques d'abus liés à l'assouplissement du critère de compétence qui permet désormais la reconnaissance d'une large catégorie de jugements par défaut auparavant inexécutables. Le moyen de défense fondé sur la fraude n'est pas recevable en l'espèce. Tous les faits que les appelants évoquent à l'appui de ce moyen de défense étaient connus d'eux ou auraient pu être découverts à l'époque de l'action en Floride. De plus, même s'il s'agit d'un cas où il conviendrait, en principe, de donner une interprétation plus généreuse du moyen de défense fondé sur la fraude parce que la décision des appelants de ne pas participer aux procédures en Floride était raisonnable, il reste qu'en l'absence de preuve ce moyen de défense ne pouvait pas être invoqué avec succès même en tenant pour acquis que le jugement serait vicié si on pouvait établir l'existence d'une fraude commise de propos délibéré.

Le moyen de défense fondé sur la justice naturelle vise la procédure que le tribunal étranger a suivie pour rendre sa décision. Il n'y a pas lieu d'exécuter le jugement étranger lorsque le défendeur peut établir que la procédure suivie pour l'obtenir était contraire à la notion canadienne de justice naturelle. Ce moyen de défense doit être remanié sous deux aspects : les exigences en matière d'avis et d'audience doivent recevoir une interprétation téléologique et souple, et le moyen de défense doit également englober les principes de justice substantiels. L'avis est suffisant lorsque le défendeur reçoit assez de renseignements pour pouvoir mesurer l'ampleur du risque auquel il est exposé. Cela signifie, notamment, que le défendeur doit être informé du montant approximatif réclamé. Pour être suffisant, l'avis doit aussi prévenir le défendeur des conséquences de toutes les démarches procédurales effectuées ou non effectuées, ainsi que des allégations qui seront examinées et tranchées au procès. Pour décider si le moyen de défense fondé sur la justice naturelle peut être invoqué, il convient d'évaluer, à la lumière de tous les facteurs pertinents, la possibilité qu'il y avait, dans le ressort d'origine, d'exercer des recours destinés à corriger un déni de justice naturelle. Dans la présente affaire, les défendeurs ontariens n'ont pas suffisamment été avertis de l'étendue et de la nature des allégations formulées contre eux dans le cadre de l'action intentée en Floride et des conséquences que cette action pourrait

plaintiffs' repeatedly amended pleadings. As a result, the notice afforded to the defendants did not meet the requirements of natural justice. Finally, the mere fact that the appellants have received mistaken legal advice and did not avail themselves of the remedies available in Florida should not operate to relieve the respondents entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not, in itself, bar the appellants from relying on this defence. In the circumstances of this case, when all the relevant factors are considered, the appellants' apprehensiveness about going to Florida to seek relief was understandable.

Even if the natural justice defence did not apply, this judgment should not be enforced. The facts raise very serious concerns about the fairness of enforcing the Florida judgment which do not fit easily into the categories identified by the traditional impeachment defences. The circumstances of this case are such that the enforcement of this judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. The Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim, the fact that the parties did not compete on a level playing field, and the lack of transparency in the Florida proceedings. The implication of the majority position is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how meritless the claim or how small the amount of damages appears to be, on pain of potentially devastating consequences from which Canadian courts will be virtually powerless to protect them. Moving the law of conflicts in such a direction should be avoided.

entraîner. Les défendeurs n'ont pas non plus été avisés des risques sérieux auxquels les exposerait le défaut de déposer de nouveau leur défense pour répondre aux actes de procédure maintes fois modifiés des demandeurs. Par conséquent, l'avis donné aux défendeurs ne satisfaisait pas aux exigences de la justice naturelle. Enfin, le simple fait que les appelants aient reçu des conseils juridiques erronés et qu'ils n'aient pas exercé les recours disponibles en Floride ne devrait pas soustraire les intimés à toutes les conséquences d'une violation importante ou substantielle des règles de justice naturelle, ni empêcher, en soi, les appelants d'invoquer ce moyen de défense. Compte tenu de tous les facteurs pertinents, la réticence des appelants à retourner en Floride pour y exercer un recours devenait compréhensible dans les circonstances.

Même s'il n'était pas possible d'invoquer le moyen de défense fondé sur la justice naturelle, il n'y aurait pas lieu d'exécuter ce jugement. Les faits soulèvent de très sérieuses questions au sujet du caractère équitable de l'exécution du jugement de la Floride qui entre difficilement dans les catégories visées par les défenses traditionnelles consistant à attaquer la validité d'un jugement. Les circonstances de la présente affaire sont telles que l'exécution du jugement choquerait la conscience des Canadiens et des Canadiennes et jetterait une ombre sur notre système judiciaire. Les appelants n'ont rien fait qui porte atteinte aux droits des intimés et n'ont certes rien fait qui mérite d'être puni aussi sévèrement. On ne peut pas dire non plus qu'ils ont cherché à se soustraire à leurs obligations en se terrant dans leur propre ressort ou qu'ils ont manqué de respect envers le régime juridique de la Floride. Compte tenu des renseignements et des conseils qui leur avaient été donnés, ils ont agi de bonne foi en tout temps et ont fait montre de diligence en prenant toutes les mesures qui leur semblaient requises. Les demandeurs à l'action intentée en Floride semblent avoir profité de la situation difficile des défendeurs pour protéger leurs intérêts aussi énergiquement que possible, et pour réaliser un profit important et inattendu. En raison de l'inégalité des chances entre les parties et du manque de transparence des procédures qui se sont déroulées en Floride, le tribunal de l'Ontario n'aurait pas dû autoriser l'exécution du jugement ainsi obtenu, sans tenir compte de la nature douteuse de la demande. Le point de vue adopté par les juges majoritaires signifie que les défendeurs canadiens seront désormais tenus de participer aux poursuites intentées à l'étranger — même celles qui peuvent sembler plus ou moins fondées ou si dérisoire que puisse raisonnablement paraître le montant de dommages-intérêts réclamé — sous peine de subir des conséquences potentiellement dévastatrices contre lesquelles les tribunaux canadiens ne pourront pratiquement pas les protéger. Il faut éviter de donner cette orientation au droit international privé.

C. *Section 7 of the Canadian Charter of Rights and Freedoms*

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The appellants submitted that the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy. It was argued that the recognition and enforcement of that judgment by a Canadian court would constitute a violation of s. 7 of the *Charter*. The appellants submitted that a *Charter* remedy should be recognized to the effect that, before a domestic court enforces a foreign judgment which would result in the defendant's bankruptcy, the court must be satisfied that the foreign judgment has been rendered in accordance with the principles of fundamental justice. No authority is offered for that proposition with which I disagree but, in any event, the Florida proceedings were conducted in conformity with fundamental justice. The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment. As s. 7 of the *Charter* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, I have difficulty accepting that s. 7 should shield a Canadian defendant from the enforcement of a foreign judgment.

V. Disposition

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The parties agreed that the Florida court had a real and substantial connection to the action launched by the respondents. Having properly taken jurisdiction, the judgment of that court must be recognized and enforced by a domestic court, provided that no defences bar its enforcement. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence. Although the damage award may appear disproportionate to the original value of the land in question, that cannot be determinative. The judgment of the Florida court should be enforced.

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The appeal is dismissed with costs.

C. *L'article 7 de la Charte canadienne des droits et libertés*

Les appelants ont soutenu que le jugement rendu en Floride ne peut être exécuté parce que cela les obligerait à faire faillite. Ils ont allégué que la reconnaissance et l'exécution de ce jugement par un tribunal canadien constituerait une violation de l'art. 7 de la *Charte*. Selon eux, il y a lieu de faire droit à un recours fondé sur la *Charte* étant donné que, pour exécuter un jugement étranger qui entraînerait la faillite du défendeur, le tribunal national doit être convaincu que ce jugement est conforme aux principes de justice fondamentale. Aucune jurisprudence ni aucune doctrine n'est citée à l'appui de cette proposition à laquelle je ne souscris pas, et, quoi qu'il en soit, l'instance en Floride s'est déroulée d'une manière conforme à la justice fondamentale. L'obligation d'un tribunal national de reconnaître et d'exécuter un jugement étranger ne saurait être tributaire de la capacité du défendeur de payer le montant que ce jugement lui ordonne de verser. Vu que l'art. 7 de la *Charte* ne protège pas un résident canadien contre les conséquences financières de l'exécution d'un jugement rendu par un tribunal canadien, j'ai peine à croire qu'il devrait protéger un défendeur canadien contre l'exécution d'un jugement étranger.

V. Dispositif

Les parties ont convenu que le tribunal de la Floride avait un lien réel et substantiel avec l'action intentée par les intimés. Étant donné que ce tribunal a exercé correctement sa compétence, un tribunal national se doit de reconnaître et d'exécuter le jugement qu'il a rendu, pourvu qu'aucun moyen de défense ne vienne en empêcher l'exécution. En l'espèce, la preuve ne justifie d'invoquer aucun des moyens de défense existants qui sont fondés sur la fraude, la justice naturelle ou l'ordre public. Bien que le montant des dommages-intérêts accordés puisse paraître démesuré par rapport à la valeur initiale du terrain en cause, cela ne saurait être déterminant. Le jugement rendu par le tribunal de la Floride doit être exécuté.

L'appel est rejeté avec dépens.

TAB C

In the Court of Appeal of Alberta

Citation: Calgary (City) v. Budge, 1991 ABCA 3

Date: 19910123
Docket: 10436
Registry: Calgary

Between:

The City of Calgary and Robert Earl Marwick

Appellants
(Defendants)

- and -

James W. Bruce Budge and Roberta Budge

Respondents
(Plaintiffs)

- and -

The Workers' Compensation Board and the Attorney General of Alberta

Intervenors

The Court:

The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Irving

Reasons for Judgment of The Honourable Mr. Justice Foisy
Concurred in by The Honourable Madam Justice Hetherington
Concurred in by The Honourable Mr. Justice Irving

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE J.D. BRACCO
DATED THE 13th DAY OF AUGUST, A.D. 1987 FILED THE 28th DAY OF JULY, A.D. 1988

COUNSEL:

A.A. Abougoush, Esq., J.C. Anderson, Esq. and J.H.J. Gescher, Esq., for the Appellants

J.R. McKee, Esq. and Ms. T.L. Mair, for the Respondents

J.D. Carr, Esq. and R.C. Maybank, Esq., for the Intervenors

**REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE FOISY**

[1] This is an appeal from a decision of Bracco, J. (as he then was) reported at (1987) 80 A.R. 207, 54 A.L.R. 97, [1987] 6 W.W.R. 217, in which he held that s. 18(1) of the *Workers' Compensation Act*, (the "Act") S.A. 1981, c. W-16 violated the rights of the respondents under ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, (the "Charter"). He further held that s. 18(1) of the *Act* was not saved by s. 1 of the Charter and declared s. 18(1) inoperative as between the parties to this action.

[2] It was conceded by the respondents that this court is bound by the subsequent decision of the Supreme Court of Canada in *Reference re: Workers' Compensation Act*, 1983 (Nfld.) ss. 32, 34 (1989) 56 D.L.R. (4th) 765 wherein it was held that Newfoundland's *Workers' Compensation Act* did not discriminate within the meaning of s. 15(1) of the Charter. Accordingly the only issue before this court is whether or not s. 18(1) of the *Act* offends s. 7 of the *Charter*.

[3] A short recital of the facts is perhaps useful. In 1982 the respondent Robert Budge, during the course of his employment in an industry to which the *Act* applies, was involved in a motor vehicle accident with a light rail transit vehicle, the property of the appellant the City of Calgary and operated by the appellant Robert Marwick during the course of his employment. Both the City of Calgary as an employer and Robert Marwick as an employee are covered by the *Act*.

[4] The respondents commenced an action for damages in September of 1983. The respondent, James Budge, claimed damages for personal injuries and his spouse, the respondent Roberta Budge, claimed for loss of consortium against the appellants.

[5] Section 18(1) of the *Act* reads as follows:

18(1) If an accident happens to a worker entitling him or his dependants to compensation under this Act, neither the worker, his legal personal representatives, his dependants nor his employer has any cause of action in respect of or arising out of the personal injury suffered by or the death of the worker as a result of the accident

(a) against any employer, or

(b) against any worker of an employer, in an industry to which this Act applies when the conduct of that employer or worker that caused or contributed to the injury arose out of and in the course of employment in an industry to which this Act applies.

[6] Section 7 of the Charter provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[7] At the outset we were advised that the respondent Roberta Budge had settled her claim and that effectively she was no longer part of this appeal. Counsel for the Workers' Compensation Board, however, requested that we deal with her claim as it relates to s. 7 of the Charter because there were a number of outstanding claims by dependants under similar circumstances which were awaiting the court's decision in this case.

[8] Bracco, J. was of the opinion that "the right to seek redress for a tort committed against one's person is surely as fundamental a right as the Charter guaranteed security of one's person". He held this breach of s. 7 to be not in accordance with the principles of fundamental justice. He then concluded that s. 18(1) of the Act was unduly broad and not justifiable in a free and democratic society because it barred an injured worker from suing any employer or employee without regard to the relationship or connection between the injured worker and the employer or employee responsible for the injury.

[9] In deciding whether or not there has been a violation of rights under s. 7 it is necessary first to determine if there has been a violation of the right to life, liberty and security of the person. If the answer is in the affirmative, only then does it become necessary to decide whether or not the infringement in question is in accordance with the principles of fundamental justice. With respect to the chambers judge, and for the reasons that follow, there has been no violation of the right to life, liberty and security of the person and accordingly it is not necessary to go on to the second component contained in s. 7 of the *Charter*.

[10] It is argued on behalf of Mr. Budge that s. 18(1) of the Act violates the security of the person by depriving him of his common law action for damages for injuries suffered as a result of the accident by substituting compensation under the Act. Similarly with respect to Mrs. Budge it is said that by denying her a statutory cause of action for loss of consortium given her under the *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 43, s. 18(1) of the Act violates her security of the person. The respondents rely on the decision of Lamer, J. (as he was then) in *Reference Re: Criminal Code, Sections 193 and 195.1(1)(c)* [1990] 4 W.W.R. 481 (S.C.C.), where he states, at 526:

"... I am of the view that s. 7 is implicated when the state, by resorting to the justice system, restricts an individual's physical liberty in *any circumstances*. Section 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity."

[11] The respondents maintain that s. 18(1) of the *Act*, by denying them recourse to the courts to pursue a civil claim, both interferes with and removes from them control over their mental integrity. They further argue that the existence of an economic component is not sufficient to take it outside the protection afforded by s. 7. While the second point may be correct (a point I do not have to decide), in my view we are dealing here primarily, if not entirely, with property and economic rights. It is not disputed that a cause of action is a chose in action and accordingly a species of personal property (see J. Crossley Vaines, Personal Property, 4th ed. (1967 Butterworths, p. 11)). In addition both respondents have sued for damages in respect of the injuries suffered by Mr. Budge in the course of his employment. The issue here is a question of quantum and is purely of an economic nature. Any mental trauma to the respondents flows from the accident, not the type of redress which may be accorded.

[12] It is true that to date the Supreme Court of Canada has specifically refrained from deciding whether some form of economic right may be protected under s. 7 of the Charter. Dickson, C.J.C. in *Irwin Toy v. Quebec (Attorney General)* (1989) 58 D.L.R. (4th) at p. 633 says:

"This is not to declare, however, that no right with an economic component can fall within 'security of the person'.We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate commercial economic rights." (the latter were held not to be protected) (emphasis added)

[13] Again in *Reference Re: Criminal Code*, Sections 193 and 195.1(1)(c), *supra* at 495, Dickson, C.J.C. states, with the concurrence of La Forest and Sopinka, J.J., that he is not deciding:

"whether 'liberty' or 'security of the person' could ever apply to any interest with an economic, commercial or property component."

[14] The same caution has been repeated in many cases where courts have refrained from deciding whether or not an economic component would be sufficient to avoid s. 7 of the Charter.

[15] In this case, however, it cannot be said that we are dealing primarily with the restriction of the physical or mental integrity of the person and that the claim for damages is merely an economic component. On the contrary, we are dealing here with a pure economic claim and a pure property right. To put the respondents' argument at its highest, it perhaps could be said (although I do not agree) that the claim is primarily economic with perhaps some type of mental and/or psychological component. In any event it is not an economic right "fundamental to human life or survival". *Irwin Toy v. Quebec (Attorney General)*, *supra*.

[16] The respondents submit that the British Columbia Court of Appeal in *Wilson v. British Columbia (Medical Services Commission)* (1988) 53 D.L.R. (4th) 171 (B.C.C.A.), has extended the application of s. 7 of the *Charter* to an economic right. In that case the *Medical Service Amendment Act* provided that doctors who did not have a number under the provincial health insurance plan for medical services provided to patients, were required to apply for such a number. Further the medical services commissioner, if granting a practitioner a number, could impose conditions and restrictions on the doctor with respect to time, place and purpose of practice which would be covered by the plan. The Court held that without the plan a medical doctor would effectively be prevented from earning a livelihood from the practice of medicine in the Province of British Columbia. The Court further held that although s. 7 did not apply to protect property or pure economic rights, the legislation violated s. 7 because it restricted the doctor's right to choose where he would practice medicine. Since a medical doctor could not survive outside the plan, the statute effectively prevented a person from practicing his or her profession, a matter concerning the dignity and sense of self worth of a person. Thus, the legislation constituted an infringement on the liberty and security of the person.

[17] It is interesting to note that Lamer, J. in *Reference re: Criminal Code*, is critical of the decision in *Wilson v. British Columbia (Medical Services Commission)*. He is of the view that the distinction that the British Columbia Court of Appeal sought to draw between the right to work and the right to pursue a profession was "not one that aids in an understanding of the scope of 'liberty' under section 7 of the *Charter*".

[18] He continues, at p. 520:

"If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all-inclusive. In such a state of affairs there would be serious reason

to question the independent existence in the Charter of other rights and freedoms such as freedom of religion and conscience or freedom of expression."

[19] In any event there is no question here of any restriction of the physical mobility of the person, nor is there any interference with the respondent's right to practice a profession, assuming that right is protected by s. 7.

[20] There is ample authority for the proposition that pure economic rights are not included under s. 7 of the *Charter*. In *Irwin Toy, supra*, at pp. 632-633 Dickson, C.J.C. stated:

"What is immediately striking about this section is the inclusion of 'security of the person' as opposed to 'property'. ... The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person' has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee.... In so stating, we find the second effect of the inclusion of 'security of the person' to be that a corporation's economic rights find no constitutional protection in that section."

[21] Although obiter Lamer, J. in *Reference re; Criminal Code, Sections 193 and 195.1(1)(c), supra*, says that, unlike the fourteenth amendment to the U.S. Constitution, s. 7 does not concern itself with economic rights. At p. 520-21 he states:

"In short, then, I find myself in agreement with the following statement of McIntyre J. in *Ref. re Pub. Service Employee Rel. Act (Alta.), supra*, at p. 412 [S.C.R.]:

It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights.

I therefore reject the application of the American line of cases that suggest that liberty under the Fourteenth Amendment includes liberty of contract. As I stated earlier, these cases have a specific historical context, a context that incorporated into the American jurisprudence certain laissez-faire principles that may not have a corresponding application to the interpretation of the Charter in the present day. There is also a significant difference in the wording of s. 7 and the Fourteenth Amendment. The American provision speaks specifically of a protection of property interests, while our framers did not choose to similarly protect property rights: see *Irwin Toy Ltd. v. Que. (A.G.)*, [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 24 Q.A.C. 2, 94 N.R. 167."

[22] A number of cases have decided that the right to bring an action for damages for personal injury is an economic right, proprietary in nature, and hence excluded from the *Charter's* protection: See *Medwid v. Ontario* (1988) 63 O.R. (2d) 578, where the Ontario High Court of Justice held that a right to sue which was prohibited by the provisions of the *Workers' Compensation Act* was not a constitutional right protected by the *Charter*; *Mirhadizadeh v.*

Ontario (1986) 57 O.R. (2d) 441 where it was held that the *Public Service Protection Act*, R.S.O. 1980, c. 406 which prohibited maintaining a cause of action for damages against those acting under public duty, did not offend s. 7 of the *Charter*; *Zutphen Brothers Construction Ltd. v. Dywidag Systems International, Canada Ltd.* (1987) 35 D.L.R. (4th) 433 (N.S.C.A.) where it was held that the *Federal Court Act*, R.S.C. 1970, c. 10 (2nd Supp.) which prohibited the plaintiff from adding the Crown as a co-defendant by giving the Federal Court exclusive jurisdiction did not constitute a violation of s. 7 of the *Charter* (appeal to the Supreme Court of Canada allowed on other grounds [1990] 1 S.C.R. 705); *Re Terzian et al and Workmen's Compensation Board et al* (1983), 148 D.L.R. (3d) 380 where the Ontario High Court of Justice Divisional Court held, in a case analogous to the case at bar, that the *Ontario Workmen's Compensation Act* prohibiting the right to bring an action for damages did not violate s. 7 of the *Charter*.

[23] One further case worthy of note is *Whithread v. Walley* [1988] 5 W.W.R. 313 (B.C.C.A.). One of the issues in that case was whether certain sections of the *Canada Shipping Act*, R.S.C. 1970, c. S-9 which restricted the measure of damages for injuries caused to any person while on board a ship violated s. 7 of the *Charter*. The plaintiff was injured in a boating accident and sought to impose liability on the owner of the boat, as well as the passenger who was operating the boat at the time of the accident, beyond the measure of damages allowed under the *Canada Shipping Act*, *supra*. McLachlin, J.A. (as she then was), stated at p. 324:

"The plaintiff's case, reduced to its essence, is that the limitations of liability imposed by ss. 647 and 649 of the *Canada Shipping Act*, while on their face economic, are so directly connected to the physical and psychological liberty and security of his person that s. 7 of the *Charter* applies."

[24] In rejecting the argument that economic interests which may affect a person's life, liberty or security fall under s. 7 of the *Charter*, McLachlin, J.A. stated at p. 325:

"[the plaintiff's argument] requires reading into s. 7, after the declaration that a person has the right to 'life, liberty and security of person', the additional phrase that he has the right to 'any benefit which may enhance life, liberty or security of person'. This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence might claim that the resultant financial loss has affected his liberty and security of person

because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the Charter and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers."

[25] McLachlin, J.A. went on to say that, in any event, the deprivation of the plaintiff's life, liberty, and security of person was not caused by sections 647 and 649 of the *Canada Shipping Act*. Rather, the plaintiff's physical and psychological loss arose independently from the impugned provisions. That is, the loss was caused by the accident. Accordingly, McLachlin, J.A. held that s. 7 of the *Charter* had not been violated. In her judgment, McLachlin, J.A. stopped short however, of asserting that s. 7 could never include an interest with an economic component.

[26] When *Whitbread* was appealed to the Supreme Court of Canada, the appeal on this issue was dismissed from the Bench. (*Whitbread v. Walley* (1990), Unreported.)

[27] It follows that the interest of both respondents is proprietary in nature and purely economic and is not protected by s. 7 of the *Charter*.

[28] The foregoing should be read in context. It has to do with a statute which replaces common law liability with a special scheme of compensation much like insurance. So it does not bar all recourse. It does not pardon or legalize tortious conduct, still less deliberate conduct. In a different case with different facts outside that context, different *Charter* considerations might apply. But I need not consider whether that is so here. In any event, no argument was made here that the law of torts generally is protected under s. 7 of the *Charter*.

[29] The appeal is allowed. The order of the learned chambers judge insofar as it relates to ss. 7 and 15(1) of the *Charter* is set aside.

[30] With respect to costs it is noted that the appellants and the Workers' Compensation Board as intervener have sought costs while the Attorney General of Alberta as intervener has not sought costs. Unless written submissions to the contrary are received within 30 days from the date of filing of these reasons the appellants and the Workers' Compensation Board will have costs of this appeal as well as costs in the court below.

DATED at CALGARY, Alberta

this 23rd day of JANUARY,

A.D. 1991

TAB D

The Canada Employment and Immigration
Commission

and

The Deputy Attorney General of
Canada *Appellants*

v.

Alphonse Caron, Georges-Émile Richard,
Cyprien Lévesque, Harold Lévesque, Régis
Dubé, Michel Giroux, Paul-Henri Guité,
Philippe Celant, Jean-Noël Hudon, Roland
Poulin, Jacques Boucher, Marc-André
Gagnon, Guy Martin, Gilles Lévesque,
Lucien Lévesque, Jean Vallée, Giovanni De
Falchi, Majorique Arseneault, Herman
Crousset, Sylvain Côté, Gilbert Caron,
Lionel Caron, Lionel D'Astous, Jean-Paul
Landry, Léon-Denis Pelletier, Ghislain St-
Pierre, Réjean Gagnon, Donald Gendreau,
Gilles Comeau, Roland Jourdain, Louis-
Philippe Lavoie, Réal Tremblay, Normand
Goulet, Justy Côté, Noël Martel, Mario
Gagnon, Marius Caron, Gilles Morin, Guy
Poulianne, Guy Caron, Jacques-André
Gauthier, Serge Ross, Roger Ratté, Jean-
Claude Martel, Jocelyn Dion, Jacques
Dupont, Jean-Marc Pineault, Alain Martel,
Régis Simard, Jocelyn Pelletier, Bertrand
Bouchard, Louis Sénéchal, Lucien Jourdain,
Gabriel Dufour, Jean-Claude Bernatchez,
Georges Bérubé, Jean-Paul Lamarre, Yvon
Tremblay, Fernand Roy, Régis Tremblay,
François Camire, Fernand Simard,
Normand Coursol, André St-Gelais, Rosaire
Delarosbil, Walter Arseneault, William
Bourque, Hugues Lévesque, Gérard Ouellet,
Alfred Noël, Robert-A. Butland, Carmel
Leblanc, Lucien Dionne, Louis-Marie
Verreault, Rudolf Bard, Welley Deschesne,
Paul-Armand Lagacé, Robert Lefrançois,
Clément Ross, Albert Racine, Andréa
Roussy, Léopold Marquis, Benoit Gagné,

La Commission de l'emploi et de
l'immigration du Canada

et

Le sous-procureur général du
Canada *Appelants*

b c.

Alphonse Caron, Georges-Émile Richard,
Cyprien Lévesque, Harold Lévesque, Régis
Dubé, Michel Giroux, Paul-Henri Guité,
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Gagnon, Guy Martin, Gilles Lévesque,
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Léopold Lévesque, Gilles St-Laurent, André Dionne, Yvon Brisebois, Gaylan Allaire, Sylvain Tremblay, Floriant Lévesque, Jean-Yves Pépin, Jean-Rock Raymond, Raynald Pineault, Alain Saucier, Jean-Marie Caron, Georges-Aimé Bernier, Dominic Simard, Laurent Desrochers, Langis Brisson, Jean-Charles Comeau, Jeannot Moreau, Gilles Charest, Gaston Marin, Victorien Boulay, Jeannot Vaillancourt, Roberge Duchaine, Armand Côté, Claude Vallée, Denis Therrien, Gérald Delarosbil, Gaston Côté, Yves Côté, Henri Aubrais, Denis Dupont, Réjean Turcotte, Marquis Germain, Benoit Quimper, Réjean Chevarie, Rénald Simard, Serge Dionne, Mario Gauthier, Rémi Bérubé, Jacques Parent, Marc Pelletier, René Pineault, Wilfrid Savard, Julien Cassista, Gérald Dallaire, Ghislain Lepage, Jean-Yves Guimper, Léger Savoie, Robert Lareau, Gilles Desmeules, Bertrand Daraiche, Donald Gagné, Conrad Tremblay, René Blackburn, Réjean Villeneuve, Jacques Mailloux, David Butland, Bernard Gagné, Mario Desbiens, Mario Bédard, Ghislain Durand, Gabriel Dupont, Pierre Roy, Gilbert Gagnon, Laurent Jomphe, Jean-Yves Gendron, Yves Labonté, Daniel Desrosiers, Lionel Valcourt, Jean-Claude Dupuis, Gilles O'Connor, Ghislain Pelletier, Paul Chiasson, Marcel Lévesque, Germain Dufour, Rino Morin, Bermond Blanchette, Roch Ringuette, Gilles D'Amours, Gilles Daraiche, Gervais Dastous, Pierre Drapeau, Camil Brisson, Benoit Landry, Gaétan Gendreau, Gilles Lemelin, Guy Bélanger, Rémy Gaudreault, Paul Talbot, Nelson Parent, Roger Poirier, Angelo Lemieux, Marc Paquet, Normand Huard, Marc Ruest, Pierre Bureau, Alain Morneau, Bruno Potvin, Donald Caron, Michel Collin, Léandre Michaud, Élie Gagnon, Jean-Marc Thibeault, Dominic Perreault, Richard Girard, Normand Nicolas, Roger Côté,

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Marc Létourneau, Gilles Martin, Gilles Savard, Jean-Paul Le Guilcher, Denis Beaulieu, Roland Gagnon, Viateur Couturier, Marcel Lévesque, Anicet Tremblay, Mario Dufour, François Boucher, Jean-Guy Nadeau, Rock Boulianne, Mario Gauthier, Normen Gauthier, Georges Gagnon, Bertrand Laprise, André Jean, Marcel Dubé, Normand Bérubé, Gérard Lebouthillier, Gilles Pearson, Gilles Malouin, Réjean Lévesque, Claude Coulombe, Yves Gagnon, Réjean Vallée, Denis Bérubé, Léon Gagnon, Guy Franck, Jocelyn Bourret, Yves Morin, Denis Cassista, Patrice Caron, Benoît Ross, Gilles Gagné, Anaclet Bernatchez, Gaétan Cormier, Camil Dion, Alain Côté, Pierre Lévesque, Sylvain Gagnon, Clermont Dupont, Gino Roy, Pierre Imbeault, Jacques Arseneault, Denis Harrisson, Guy St-Pierre, Jean-Marc Levasseur, Gérard Imbeault, Jean-François Beaudin, Denis Rousseau, Ghislain Fournier, Jacques Lefrançois, Mario Ross, Pierre Martel, Réjean Bonneau, Réjean Dufour, Donald Lévesque, Jean-Pierre Gagné, Marcel Damien, Hosman Fortin, Denis Martin, Serge Rouleau, Donald Bélanger, Denis Guité, Christian D'Astous, Réjean D'Astous, Bernard Arseneault, Réjean Truchon, Gilles Beaudin, Robert Gagnon, Michel Beaulieu, Marcel Bourque, Michel St-Gelais, Gilles Létourneau, Carl Ferlate, Marc Laliberté, Jeannot Gagnon, Jean Robitaille, Roger D'Amours, Alain Coulombe, Rémy Malouin, Jean-Guy Pelletier, Nelson Pelletier, Régis Boulay, Guy Pouliot, Serge Beaudet, Jean Paradis, Donald Lebrun, Michel Millier, Réal Goulet, Claude Valois, Raynald Mimeault, Serge Chouinard, Armand Gaul, Pierre Savard, Pierre Coulombe, Michel Mimeault, Marc-Aurèle Dufour, Gilles Moreau, Richard Perreault, André Roussy, Dany Dufour, Guy Bard, Gaétan Fournier,

Marc Létourneau, Gilles Martin, Gilles Savard, Jean-Paul Le Guilcher, Denis Beaulieu, Roland Gagnon, Viateur Couturier, Marcel Lévesque, Anicet Tremblay, Mario Dufour, François Boucher, Jean-Guy Nadeau, Rock Boulianne, Mario Gauthier, Normen Gauthier, Georges Gagnon, Bertrand Laprise, André Jean, Marcel Dubé, Normand Bérubé, Gérard Lebouthillier, Gilles Pearson, Gilles Malouin, Réjean Lévesque, Claude Coulombe, Yves Gagnon, Réjean Vallée, Denis Bérubé, Léon Gagnon, Guy Franck, Jocelyn Bourret, Yves Morin, Denis Cassista, Patrice Caron, Benoît Ross, Gilles Gagné, Anaclet Bernatchez, Gaétan Cormier, Camil Dion, Alain Côté, Pierre Lévesque, Sylvain Gagnon, Clermont Dupont, Gino Roy, Pierre Imbeault, Jacques Arseneault, Denis Harrisson, Guy St-Pierre, Jean-Marc Levasseur, Gérard Imbeault, Jean-François Beaudin, Denis Rousseau, Ghislain Fournier, Jacques Lefrançois, Mario Ross, Pierre Martel, Réjean Bonneau, Réjean Dufour, Donald Lévesque, Jean-Pierre Gagné, Marcel Damien, Hosman Fortin, Denis Martin, Serge Rouleau, Donald Bélanger, Denis Guité, Christian D'Astous, Réjean D'Astous, Bernard Arseneault, Réjean Truchon, Gilles Beaudin, Robert Gagnon, Michel Beaulieu, Marcel Bourque, Michel St-Gelais, Gilles Létourneau, Carl Ferlate, Marc Laliberté, Jeannot Gagnon, Jean Robitaille, Roger D'Amours, Alain Coulombe, Rémy Malouin, Jean-Guy Pelletier, Nelson Pelletier, Régis Boulay, Guy Pouliot, Serge Beaudet, Jean Paradis, Donald Lebrun, Michel Millier, Réal Goulet, Claude Valois, Raynald Mimeault, Serge Chouinard, Armand Gaul, Pierre Savard, Pierre Coulombe, Michel Mimeault, Marc-Aurèle Dufour, Gilles Moreau, Richard Perreault, André Roussy, Dany Dufour, Guy Bard, Gaétan Fournier,

Jean-Pierre Blanchette, Marc Turbis, Denis Rainville, Claude Grenier, Sabin Lévesque, Richard Perreault, Clément Paradis, Yvan Gagnon, Michel Parent, Claude Gagnon, Alain Martel, André Bissonnette, Luc Giasson, Michel Maltais, Dominic Desbiens, Serge Imbeault, Romain Daraiche, Alain Verreault, André St-Pierre, Donald Gagnon, Régis Bernier, Claude Trépanier, Gilles Foster, Daniel Ongaro, Larry Gough, Gérard Gaudet, Fernand Raymond, Sylvain Dion, H.-Léonard Goguen, Michel Hovington, Jocelyn Tremblay, André Desjardins, Hérriuge Proulx, Jean-Claude Bélanger, Jean-Louis Côté, Roger Boulay, André Beaulieu, Gérard Therrien, Marc Dufour, Daniel Martin, Norman Doucet, Mario Arseneault, Luc Gagnon, Michel Ross, Richard Cavanagh, Marc Beaulieu, Roger Morin, Clément Lavoie, Rémi Gagnon, Richard Lavoie, Guy Bernatchez, Rosaire Potvin, Rémi Bourque, André Lévesque, Marc Poirier, Serge Imbeault, Nelson Lecours, Aurèle Imbeault, Adrien St-Gelais, André St-Laurent, Patrice Hickie, Robert Lecours, Jean-Claude Deschesne, Michel Robert, Albini Fournier, Michel Savard, Henri Thorn, Marc Desjardins, Réginald Couture, Michel Girard, Marius D'Astous, Denis Laliberté, Jean-Claude Grand, Serge Fournier, Josué Landry, Nelson Larrivée, Berthier Gauthier, Denis Gauthier, Gaétan Bélanger, Claude Moisan, Roberto Otis, Robert Béchard, Réjean Doucet, Lorrain Ouellet, Harold Michaud, Camil Devost, Jean-Guy Lechasseur, Denis Paré, Alain Boulay, Daniel Boulay, Claude Rivard, Marco Bovoli, Alain Turbis, André Dick, Tarzan Bérubé, Roland Boulay, Michel-D. Ouellet, Marcel Couturier, Vincent Vallée, Clermont Tremblay, Sylvain Martel, Michel Laberge, Pierre Larouche, Léo Bouchard, Louis-Marie Ouellet, Paul Gervais, Cécil-R. Burton, Gérard Therrien,

Jean-Pierre Blanchette, Marc Turbis, Denis Rainville, Claude Grenier, Sabin Lévesque, Richard Perreault, Clément Paradis, Yvan Gagnon, Michel Parent, Claude Gagnon,
^a Alain Martel, André Bissonnette, Luc Giasson, Michel Maltais, Dominic Desbiens, Serge Imbeault, Romain Daraiche, Alain Verreault, André St-Pierre, Donald Gagnon,
^b Régis Bernier, Claude Trépanier, Gilles Foster, Daniel Ongaro, Larry Gough, Gérard Gaudet, Fernand Raymond, Sylvain Dion, H.-Léonard Goguen, Michel
^c Hovington, Jocelyn Tremblay, André Desjardins, Hérriuge Proulx, Jean-Claude Bélanger, Jean-Louis Côté, Roger Boulay, André Beaulieu, Gérard Therrien, Marc Dufour, Daniel Martin, Norman Doucet,
^d Mario Arseneault, Luc Gagnon, Michel Ross, Richard Cavanagh, Marc Beaulieu, Roger Morin, Clément Lavoie, Rémi Gagnon, Richard Lavoie, Guy Bernatchez,
^e Rosaire Potvin, Rémi Bourque, André Lévesque, Marc Poirier, Serge Imbeault, Nelson Lecours, Aurèle Imbeault, Adrien St-Gelais, André St-Laurent, Patrice Hickie,
^f Robert Lecours, Jean-Claude Deschesne, Michel Robert, Albini Fournier, Michel Savard, Henri Thorn, Marc Desjardins, Réginald Couture, Michel Girard, Marius D'Astous, Denis Laliberté, Jean-Claude
^g Grand, Serge Fournier, Josué Landry, Nelson Larrivée, Berthier Gauthier, Denis Gauthier, Gaétan Bélanger, Claude Moisan, Roberto Otis, Robert Béchard, Réjean
^h Doucet, Lorrain Ouellet, Harold Michaud, Camil Devost, Jean-Guy Lechasseur, Denis Paré, Alain Boulay, Daniel Boulay, Claude Rivard, Marco Bovoli, Alain Turbis, André
ⁱ Dick, Tarzan Bérubé, Roland Boulay, Michel-D. Ouellet, Marcel Couturier, Vincent Vallée, Clermont Tremblay, Sylvain Martel, Michel Laberge, Pierre Larouche,
^j Léo Bouchard, Louis-Marie Ouellet, Paul Gervais, Cécil-R. Burton, Gérard Therrien,

Jude Gauthier, Henri-Claude Perron, Jude Lapointe, Bernard St-Gelais, Claude Soucy, Denis Tremblay, Réjean Otis, Harold Girard, Rénald Deschesnes, Dominic St-Hilaire, Paul Malenfant, Donald Gagnon, Alain Côté, Paul Talbot, Denis Tremblay, Denis Boudreault, Jules Therrien, Denis Langlois, Éric Langlois, Serge Beaudoin, Bernard Beaulieu, Danny Marcil, Gaston Dubé, Clément Giasson, Éric Ross, Bernard Courcy, Yves Hamel, Renaud Rousseau, Michel Raymond, Mario Dufour, Normen Gauthier, Leslie Bellany, Marc Poirier and Claude Coulombe *Respondents*

INDEXED AS: CARON v. CANADA (EMPLOYMENT AND IMMIGRATION COMMISSION)

File No.: 21188.

1990: December 10; 1991: January 17.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Unemployment insurance — Labour disputes — Meaning of phrase "termination of the stoppage of work" in s. 44(1)(a) of Unemployment Insurance Act, 1971 — Workers gradually recalled for work following settlement of labour dispute — Date on which workers not immediately recalled for work eligible for unemployment insurance benefits.

The employees of an aluminum plant were locked out by their employer following a labour dispute. A collective agreement and a memorandum governing the return to work was signed on March 29, 1986, and 970 of the approximately 1430 workers immediately reported to the plant. The remaining workers were gradually recalled for work. The appellant Commission held that these workers were only eligible for unemployment insurance benefits as of May 17, 1986. Under s. 44(1)(a) of the *Unemployment Insurance Act, 1971*, "[a] claimant who has lost his employment by reason of a stoppage of work attributable to a labour dispute . . . is not entitled to receive benefit until the termination of the stoppage of work". On appeal, the Board of Referees concluded that the stoppage of work terminated on April 26. At that time, 71% of the production had been reached and 90% of employees had been recalled. On further appeal,

Jude Gauthier, Henri-Claude Perron, Jude Lapointe, Bernard St-Gelais, Claude Soucy, Denis Tremblay, Réjean Otis, Harold Girard, Rénald Deschesnes, Dominic St-Hilaire, Paul Malenfant, Donald Gagnon, Alain Côté, Paul Talbot, Denis Tremblay, Denis Boudreault, Jules Therrien, Denis Langlois, Éric Langlois, Serge Beaudoin, Bernard Beaulieu, Danny Marcil, Gaston Dubé, Clément Giasson, Éric Ross, Bernard Courcy, Yves Hamel, Renaud Rousseau, Michel Raymond, Mario Dufour, Normen Gauthier, Leslie Bellany, Marc Poirier et Claude Coulombe *Intimés*

RÉPERTORIÉ: CARON c. CANADA (COMMISSION DE L'EMPLOI ET DE L'IMMIGRATION)

N° du greffe: 21188.

1990: 10 décembre; 1991: 17 janvier.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Assurance-chômage — Conflits collectifs — Sens de l'expression «fin de l'arrêt du travail» à l'art. 44(1)a) de la Loi de 1971 sur l'assurance-chômage — Employés rappelés graduellement au travail après le règlement d'un conflit collectif — Date à laquelle les employés qui n'ont pas été rappelés immédiatement au travail deviennent admissibles aux prestations d'assurance-chômage.

À la suite d'un conflit collectif, les employés d'une usine d'aluminium ont été mis en lock-out par leur employeur. Le 29 mars 1986, une convention collective et un protocole de retour au travail ont été signés et 970 des quelque 1 430 employés se sont immédiatement présentés au travail. Les autres employés ont été graduellement rappelés au travail. La Commission appelante a décidé que ces employés n'avaient droit aux prestations qu'à partir du 17 mai 1986. Selon l'al. 44(1)a) de la *Loi de 1971 sur l'assurance-chômage*, «[u]n prestataire qui a perdu son emploi du fait d'un arrêt de travail dû à un conflit collectif [...] n'est pas admissible au bénéfice des prestations tant que ne s'est pas réalisée l'une des éventualités suivantes, à savoir, [...] la fin de l'arrêt du travail». En appel, le Conseil arbitral a conclu que l'arrêt de travail s'était terminé le 26 avril 1986. À cette date, la production atteignait 71% de la production nor-

the Umpire affirmed the Board's decision. The majority of the Federal Court of Appeal allowed the workers' application to review and set aside the Umpire's decision. It held that the workers in this case were entitled to benefits as of March 29. It found that what characterizes the s. 44(1)(a) work stoppage and distinguishes it from the claimant's loss of employment is the aspect of "intent": a work stoppage due to a labour dispute always results from the fact that one or other of the parties to a contract of service does not wish to perform it; loss of employment is independent of intent. Thus, a work stoppage attributable to a labour dispute cannot continue after the point at which the parties to a dispute have indicated a desire to resume performance of their contracts of service and have, in fact, resumed such performance. The majority noted that this new interpretation of s. 44(1)(a) was appropriate in view of the Supreme Court's judgments in *Abrahams* and *Hills*. The dissenting judge affirmed the view of the Umpire.

Held (Sopinka and Stevenson JJ. dissenting): The appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.: The position of the majority of the Federal Court of Appeal is substantially agreed with. Nothing in s. 44(1) of the Act supports the use of criteria such as particular levels of production, and the return to work of a particular number of employees, in the interpretation of the words "termination of the stoppage of work". While the majority reasons should not be read as stating that the end of a labour dispute necessarily implies the termination of a stoppage of work in every case, the majority properly concluded in this case that March 29 was the day of the termination of the stoppage of work.

Per Sopinka and Stevenson JJ. (dissenting): The analysis of the dissenting judge in the Federal Court of Appeal is substantially agreed with. Section 44(1) of the Act reflects the principle of neutrality of the state in labour disputes. Commission funds are not to be used to alleviate the consequences of a labour dispute. Neutrality requires that those funds should not be available to the striking or locked-out workers until the resulting stoppage is at an end. Those consequences, for the employees as well as for the employer, last until the work affected is no longer stopped and the production has come back to normal. Until that point, the employee's loss of employment is attributable to a labour dispute. The decisions of this Court in *Abrahams* and *Hills* do

male et 90% des employés avaient été rappelés. À la suite d'un nouvel appel, le juge-arbitre a confirmé la décision du Conseil. La majorité de la Cour d'appel fédérale a accueilli la demande d'examen et d'annulation de la décision du juge-arbitre, présentée par les employés. Elle a décidé que les travailleurs en l'espèce avaient droit aux prestations à partir du 29 mars. Elle a conclu que ce qui caractérise un arrêt de travail au sens de l'al. 44(1)a) et ce qui le distingue de la perte de l'emploi du prestataire est l'aspect «volonté»: un arrêt de travail dû à un conflit collectif provient toujours du fait que l'une ou l'autre des parties au contrat de louage de services ne veut pas l'exécuter; la perte d'emploi est un phénomène indépendant de la volonté. Donc un arrêt de travail dû à un conflit collectif ne peut subsister après le moment où les parties au conflit ont manifesté le désir de recommencer l'exécution de leurs contrats de louage de services et ont, en fait, recommencé cette exécution. La majorité a indiqué que cette nouvelle interprétation de l'al. 44(1)a) était légitime compte tenu des arrêts *Abrahams* et *Hills* de la Cour suprême du Canada. Le juge dissident a adopté le point de vue du juge-arbitre.

Arrêt (les juges Sopinka et Stevenson sont dissidents): Le pourvoi est rejeté.

Les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin: La position de la majorité de la Cour d'appel fédérale est retenue pour l'essentiel. Rien au par. 44(1) de la Loi n'appuie l'emploi de critères tels les divers niveaux de production et le retour au travail d'un nombre donné d'employés aux fins d'interpréter les mots «fin de l'arrêt du travail». Les motifs de la majorité ne signifient pas que la fin d'un conflit collectif implique nécessairement, dans chaque cas, la fin d'un arrêt de travail, mais la majorité a eu raison de conclure qu'en l'espèce la fin de l'arrêt du travail est survenue le 29 mars.

Les juges Sopinka et Stevenson (dissidents): L'analyse du juge dissident en Cour d'appel fédérale est retenue pour l'essentiel. Le paragraphe 44(1) de la Loi exprime le principe de la neutralité de l'État dans les conflits collectifs. Les fonds de la Commission ne doivent pas être utilisés pour atténuer les conséquences d'un conflit collectif. La neutralité exige que ces fonds ne soient pas mis à la disposition des travailleurs en grève ou en lock-out tant que l'arrêt de travail n'est pas terminé. Ces conséquences, pour les employés autant que pour l'employeur, prévalent tant que l'arrêt de travail n'est pas terminé et que la production n'est pas revenue à la normale. Jusqu'à ce moment-là, la perte d'emploi est attribuable à un conflit collectif. Les arrêts

not mandate any reversal of the previously settled case law under the section in question.

Cases Cited

By L'Heureux-Dubé J.

Referred to: *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513.

By Stevenson J. (dissenting)

Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513.

Statutes and Regulations Cited

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10 [now R.S.C., 1985, c. F-7], s. 28.

Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 44(1) [now the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1, s. 31(1) [rep. & sub. 1990, c. 40, s. 23]].

Unemployment Insurance Regulations, C.R.C. 1978, c. 1576, s. 49 [rep. & sub. SOR/90-756, s. 13].

Unemployment Insurance Regulations, amendment, SOR/90-756, s. 13.

APPEAL from a judgment of the Federal Court of Appeal, [1989] 1 F.C. 628, 55 D.L.R. (4th) 274, 91 N.R. 1, 89 CLLC ¶ 14027, granting respondents' application under s. 28 of the *Federal Court Act* to review and set aside the decision of an umpire under the *Unemployment Insurance Act, 1971*, CUB-14267. Appeal dismissed, Sopinka and Stevenson JJ. dissenting.

Claude Joyal and Johanne Levasseur, for the appellants.

Guy Martin, Georges Campeau and François Lamoureux, for the respondents.

The judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ. was delivered by

L'HEUREUX-DUBÉ J.—This appeal concerns the entitlement of certain workers to unemployment in-

Abrahams et Hills de notre Cour n'exigent pas le renversement de la jurisprudence antérieure établie en vertu de l'article en question.

a Jurisprudence

Citée par le juge L'Heureux-Dubé

Arrêts mentionnés: *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513.

Citée par le juge Stevenson (dissident)

Abrahams c. Procureur général du Canada, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513.

Lois et règlements cités

Loi de 1971 sur l'assurance-chômage, S.C. 1970-71-72, ch. 48, art. 44(1) [maintenant *Loi sur l'assurance-chômage*, L.R.C. (1985), ch. U-1, art. 31(1) [abr. & rempl. 1990, ch. 40, art. 23]].

Loi sur la Cour fédérale, S.R.C. 1970 (2^e suppl.), ch. 10 [maintenant L.R.C. (1985), ch. F-7], art. 28.

Règlement sur l'assurance-chômage, C.R.C. 1978, ch. 1576, art. 49 [abr. & rempl. DORS/90-756, art. 13].

Règlement sur l'assurance-chômage — Modification, DORS/90-756, art. 13.

POURVOI contre un arrêt de la Cour d'appel fédérale, [1989] 1 C.F. 628, 55 D.L.R. (4th) 274, 91 N.R. 1, 89 CLLC ¶ 14027, qui a accueilli la demande des intimés, fondée sur l'art. 28 de la *Loi sur la Cour fédérale*, pour obtenir l'examen et l'annulation de la décision rendue par un juge-arbitre en vertu de la *Loi de 1971 sur l'assurance-chômage*, CUB-14267. Pourvoi rejeté, les juges Sopinka et Stevenson sont dissidents.

Claude Joyal et Johanne Levasseur, pour les appelants.

Guy Martin, Georges Campeau et François Lamoureux, pour les intimés.

Le jugement des juges La Forest, L'Heureux-Dubé, Gonthier, Cory et McLachlin a été rendu par

LE JUGE L'HEUREUX-DUBÉ—Cet appel a trait au droit de certains travailleurs à des prestations

TAB E

IN THE MATTER OF the National Energy Board Act;

AND IN THE MATTER OF an application by Canadian Arctic Gas Pipeline Limited for a certificate of public convenience and necessity for the construction and operation of a natural gas pipeline, under File No. 1555-C46-1;

AND IN THE MATTER OF applications by Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited and The Alberta Gas Trunk Line (Canada) Limited for certificates of public convenience and necessity for the construction and operation of certain natural gas pipelines, under File Nos. 1555-F2-3, 1555-W5-49 and 1555-A34-1;

AND IN THE MATTER OF an application by Alberta Natural Gas Company Ltd. for a certificate of public convenience and necessity for the construction and operation of certain extensions to its natural gas pipeline, under File No. 1555-A2-10;

AND IN THE MATTER OF a submission by The Alberta Gas Trunk Line Company Limited, under File No. 1555-A5-2;

AND IN THE MATTER OF an application by the National Energy Board pursuant to section 28(4) of the Federal Court Act.

The Committee for Justice and Liberty, The Consumers' Association of Canada, Canadian Arctic Resources Committee *Appellants*;

and

The National Energy Board, Canadian Arctic Gas Pipeline Limited and The Attorney General of Canada *et al. Respondents*.

1976: March 8, 9 and 10; 1976: March 11.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson and de Grandpré JJ.

DANS L'AFFAIRE DE la Loi sur l'Office national de l'énergie;

ET DANS L'AFFAIRE D'une demande présentée sous la cote 1555-C46-1 par Pipeline de gaz arctique canadien Limitée en vue d'obtenir un certificat de commodité et nécessité publiques pour la construction et l'exploitation d'un pipe-line pour le transport du gaz naturel;

ET DANS L'AFFAIRE DES demandes présentées sous les cotes 1555-F2-3, 1555-W5-49 et 1555-A34-1 par Foothills Pipe Lines Ltd., Westcoast Transmission Company Limited et Alberta Gas Trunk Line (Canada) Limited en vue d'obtenir des certificats de commodité et nécessité publiques pour la construction et l'exploitation de certains pipe-lines pour le transport du gaz naturel;

ET DANS L'AFFAIRE D'une demande présentée sous la cote 1555-A2-10 par Alberta Natural Gas Company Ltd., en vue d'obtenir un certificat de commodité et nécessité publiques pour la construction et l'exploitation de certaines extensions à son pipe-line pour le transport du gaz naturel;

ET DANS L'AFFAIRE D'une requête présentée par Alberta Gas Trunk Line Company Limited sous la cote 1555-A5-2;

ET DANS L'AFFAIRE D'une demande présentée par l'Office national de l'énergie en vertu de l'article 28(4) de la Loi sur la Cour fédérale.

Committee for Justice and Liberty, L'Association des consommateurs du Canada et Canadian Arctic Resources Committee *Appellants*;

et

L'Office national de l'énergie, Pipeline de gaz arctique canadien Limitée et le procureur général du Canada *et autres. Intimés*.

1976: 8, 9 et 10 mars; 1976: 11 mars.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson et de Grandpré.

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

Administrative law — Judicial review — Boards and tribunals — Natural justice — Bias or apprehended bias — Application for certificate of public necessity — National Energy Board Act, R.S.C. 1970, c. N-6, s. 44.

The issue in this appeal arose in connection with the organization of hearings by the National Energy Board to consider competing applications for a Mackenzie Valley pipeline, i.e. applications for a certificate of public convenience and necessity under s. 44 of the *National Energy Board Act*, R.S.C. 1970, c. N-6. The Board assigned Mr. Crowe, Chairman of the Board, and two other of its members to be the panel to hear the applications. The appellants were recognised by the Board as "interested persons" under s. 45 of the Act. The appellants objected to the participation of Mr. Crowe as a member of the panel because of reasonable apprehension or reasonable likelihood of bias: Mr. Crowe became Chairman and Chief Executive Officer of the National Energy Board on October, 15, 1973. Immediately prior to that date he was president of the Canada Development Corporation, having assumed that position late in 1971 after first having been a provisional director following the enactment of the *Canada Development Corporation Act*, 1971 (Can.), c. 49. The objects of that Corporation included assisting in business and economic development and investing in shares, securities, ventures, enterprises and property to that end. As Corporation president and as its representative Mr. Crowe was associated with the Gas Arctic-Northwest Project Study Group which considered the physical and economic feasibility of a northern natural gas pipeline to bring natural gas to southern markets. The Agreement setting up the Study Group brought together two groups of companies which merged their efforts and pursuant to the agreement set up two companies of which Canadian Arctic Gas Pipeline Limited was one. Mr. Crowe was an active participant in the Study Group as a member of its Management Committee and a member and subsequently vice-chairman of its Finance, tax and accounting committee and during his period of membership of the Management Committee he participated in the seven meetings held during that time and joined in a unanimous decision of the Committee on June 27, 1973, respecting the ownership and routing of a Mackenzie Valley pipeline. The Canada Development Corporation remained a full participant in the Study Group until long after the applications were made for certificates of public convenience and necessity and until after the hearings had commenced, in effect to the time of the

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit administratif — Contrôle judiciaire — Offices et tribunaux — Justice naturelle — Partialité ou crainte de partialité — Demande de certificat de nécessité publique — Loi sur l'Office national de l'énergie, S.R.C. 1970, c. N-6, art. 44.

La question en litige dans le présent pourvoi a été soulevée à l'occasion de la préparation des audiences devant l'Office national de l'énergie pour l'examen des demandes en conflit au sujet d'un pipe-line dans la vallée du Mackenzie. Il s'agissait de demandes de certificats de commodité et de nécessité publiques en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*. L'Office désigna M. Crowe, son président, et deux de ses membres pour entendre les demandes. Les appelants ont été reconnus par l'Office comme des «personnes intéressées» en vertu de l'art. 45 de la Loi. Les appelants se sont opposés à ce que M. Crowe siège en l'instance parce qu'il pouvait y avoir une cause raisonnable de crainte ou une probabilité raisonnable de partialité: Crowe est devenu président et fonctionnaire exécutif en chef de l'Office national de l'énergie le 15 octobre 1973. Jusqu'à cette date, il était président de la Corporation de développement du Canada, poste qu'il occupait depuis la fin de 1971, après avoir été un des administrateurs provisoires à la suite de l'adoption de la *Loi sur la Corporation de développement du Canada*, 1971 (Can.), c. 49. Les objets de la Corporation comprenaient l'aide aux entreprises et au développement économique et des investissements à cette fin dans des actions, valeurs, initiatives, entreprises et biens. En qualité de président et de représentant de la Corporation, M. Crowe fut membre du Gas Arctic-Northwest Project Study Group qui étudia la praticabilité physique et économique d'un pipe-line de gaz naturel reliant le grand nord au sud du pays. La Convention mettant sur pied le groupe d'étude réunissait deux groupes de compagnies qui mirent en commun leurs efforts et, conformément à la convention, créèrent deux compagnies dont l'une était Pipe-line de gaz arctique canadien Limitée. M. Crowe participait activement au groupe d'étude en qualité de membre de son comité de direction et comme membre et subséquemment comme vice-président du comité des finances, des impôts et de la comptabilité; à titre de membre du comité de direction, il a assisté aux sept réunions tenues par le comité pendant cette période et il a participé à la décision unanime de ce dernier le 27 juin 1973, concernant la propriété et le tracé du pipe-line de la vallée du MacKenzie. La Corporation de développement du Canada a continué de participer à part entière au groupe d'étude longtemps après le dépôt des demandes

reference of the question of reasonable apprehension of bias in Mr. Crowe to the Federal Court of Appeal. Further, during the period of Mr. Crowe's association with the Study Group as the representative of the Canada Development Corporation the latter contributed \$1,200,000 to the Study Group as its share of expenses. The National Energy Board referred to the Federal Court of Appeal the following question, "Would the Board err in rejecting the objection and in holding that Mr. Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?" pursuant to the Federal Court Act, 1970-71-72 (Can.), c. 1, s. 28(4). That Court answered in the negative.

Held (Martland, Judson and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ.: In dealing with applications under s. 44 of the *National Energy Board Act*, the function of the Board is quasi-judicial, or, at least, is a function which the Board must discharge in accordance with the rules of natural justice; and if not necessarily the full range of such rules as would apply to a Court (though the Board is a court of record under s. 10 of the Act) certainly to a degree that would reflect integrity of its proceedings and impartiality in the conduct of those proceedings. A reasonable apprehension of bias arises where there exists a reasonable probability that the judge might not act in an entirely impartial manner. The issue in this situation was not one of actual bias. Thus the facts that Mr. Crowe had nothing to gain or lose either through his participation in the Study Group or in making decisions as chairman of the National Energy Board and that his participation in the Study Group was in a representative capacity became irrelevant. The participation of Mr. Crowe in the discussions and decisions leading to the application by Canadian Arctic Gas Pipeline Limited for a certificate did however give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined. The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard for the public interest.

Per Martland, Judson and de Grandpré JJ. dissenting: The proper test to be applied was correctly expressed by

de certificat de commodité et nécessité publiques et après l'ouverture des audiences, en fait, jusqu'à ce que la question relative à la crainte de partialité de la part de M. Crowe soit soumise à la Cour d'appel fédérale. En outre, durant la période où M. Crowe a participé au groupe d'étude, à titre de représentant de la Corporation de développement du Canada, celle-ci a contribué 1.2 million de dollars aux dépenses occasionnées par les activités du groupe d'étude. Conformément à la *Loi sur la Cour fédérale*, 1970-1971-1972 (Can.), c. 1, art. 28(4), l'Office national de l'énergie a déféré la question suivante à la Cour d'appel fédérale: «l'Office ferait-il erreur en rejetant les objections et en statuant que M. Crowe n'est pas inhabile à faire partie du comité pour cause de crainte ou probabilité raisonnable de partialité?» Cette Cour a répondu par la négative.

Arrêt (les juges Martland, Judson et de Grandpré étant dissidents): Le pourvoi doit être accueilli.

Le juge en chef Laskin et les juges Ritchie, Spence, Pigeon et Dickson: Le rôle de l'Office, lorsqu'il se prononce sur une demande présentée en vertu de l'art. 44 de la *Loi sur l'Office national de l'énergie*, est quasi judiciaire ou, du moins, doit être exercé conformément aux principes de justice naturelle; et s'il n'est pas nécessairement soumis à toutes les règles qui s'appliquent à un tribunal (bien que l'Office soit une cour d'archives en vertu de l'art. 10 de la Loi) il l'est certainement à un degré suffisant pour être tenu de manifester l'intégrité de sa procédure et son impartialité. Il y a crainte raisonnable de partialité lorsqu'il y a une probabilité raisonnable que le juge n'agisse pas de manière tout à fait impartiale. Aucune question de partialité réelle n'est soulevée en l'espèce. Le fait que M. Crowe n'avait rien à gagner ni à perdre, en participant au groupe d'étude ou en rendant des décisions en qualité de président de l'Office national de l'énergie et qu'il participait au groupe d'étude en qualité de représentant n'est pas pertinent. La participation de M. Crowe aux discussions et décisions menant à la demande faite par Pipeline de gaz arctique canadien Limitée en vue d'obtenir un certificat a pu donner naissance, chez des personnes assez bien renseignées, à une crainte raisonnable de partialité dans l'appréciation des questions à trancher. Ce critère de probabilité ou crainte raisonnable de partialité, quelque involontaire que soit cette partialité, se fonde sur la préoccupation qu'il ne faut pas que le public puisse douter de l'impartialité des organismes ayant un pouvoir décisionnel et cette préoccupation se retrouve en l'espèce puisque l'Office est tenu de prendre en considération l'intérêt du public.

Les juges Martland, Judson et de Grandpré, dissidents: La Cour d'appel a défini avec justesse le critère

the Court of Appeal. The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information, the test of "what would an informed person, viewing the matter realistically and practically—conclude?" There is no real difference between the expression found in the decided cases "reasonable apprehension of bias", "reasonable suspicion of bias" or "real likelihood of bias" but the grounds for the apprehension must be substantial. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted with an administrative discretion. While the basic principle that natural justice must be rendered is the same its application must take into account the special circumstances of the tribunal. By its nature the National Energy Board must be staffed with persons of experience and expertise. The considerations which underlie its operations are policy oriented. The basic principle in matters of bias must be applied in the light of the circumstances of the case at bar. The Board is not a court nor is it a quasi-judicial body. In hearing the objection of interested parties and in performing its statutory function the Board has the duty to establish a balance between the administration of policies which they are duty bound to apply and the protection of the various interests spelled out in s. 44 of the Act. In reaching its decision the Board draws upon its experience, upon that of its own experts and upon that of all agencies of the Government of Canada. The Board is not and cannot be limited to deciding the matter on the sole basis of the representations made before it. In the circumstances of the case the Court of Appeal rightly concluded that no reasonable apprehension of bias by reasonable, right minded and informed persons exists.

[*Ghirardosi v. Minister of Highways for British Columbia*, [1966] S.C.R. 367; *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *Szilard v. Szasz*, [1955] S.C.R. 3 referred to.]

APPEAL from a judgment of the Federal Court of Appeal¹ which answered in the negative a question referred to it by the National Energy Board. Appeal allowed, Martland, Judson, and de Grandpré JJ. dissenting.

¹ [1976] 2 F.C. 20.

applicable. La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question... de façon réaliste et pratique?». Il n'y a pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité», mais les motifs de crainte doivent être sérieux. La question de la partialité ne peut être examinée de la même façon dans le cas d'un membre d'un tribunal judiciaire que dans le cas d'un membre d'un tribunal administratif que la loi autorise à exercer ses fonctions de façon discrétionnaire. Le principe fondamental est le même: la justice naturelle doit être respectée. En pratique cependant, il faut prendre en considération le caractère particulier du tribunal. De par la nature même de l'organisme, les membres de l'Office national de l'énergie doivent être expérimentés et compétents. Les considérations sur lesquelles se fondent ses activités sont d'ordre politique. Le principe fondamental régissant les questions de partialité doit s'appliquer à la lumière des circonstances en l'espèce. L'Office n'est pas un tribunal judiciaire ni un organisme quasi judiciaire. En étudiant les objections des parties intéressées et en exerçant les fonctions que lui a attribuées la loi, l'Office est tenu de maintenir l'équilibre entre les lignes de conduite qu'il a l'obligation d'appliquer et la protection des différents intérêts mentionnés à l'art. 44 de la Loi. Pour parvenir à une décision, l'Office se fonde sur son expérience, sur celle de ses experts et celle de tous les organismes du gouvernement du Canada. Il est évident que l'Office ne peut être obligé de se fonder uniquement sur les représentations qui lui sont faites pour trancher la question. Compte tenu des circonstances en l'espèce, la Cour d'appel a eu raison de conclure que des personnes sensées, raisonnables et bien informées ne pouvaient avoir de crainte raisonnable de partialité.

[Arrêts mentionnés: *Ghirardosi c. Le Ministre de la Voirie de la Colombie-Britannique*, [1966] R.C.S. 367; *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833; *Szilard c. Szasz*, [1955] R.C.S. 3.]

POURVOI contre un arrêt de la Cour d'appel fédérale¹ qui a répondu par la négative à une question déférée par l'Office national de l'énergie. Pourvoi accueilli, les juges Martland, Judson et de Grandpré étant dissidents.

¹ [1976] 2 C.F. 20.

Ian Binnie, and R. J. Sharpe, for the appellants.

Hyman Soloway, Q.C., and R. D. McGregor, for the National Energy Board.

G. W. Ainslie, Q.C., for the Attorney General of Canada.

D. M. M. Goldie, Q.C., for Canadian Arctic Gas Pipeline Ltd.

R. J. Gibbs, Q.C., and G. J. Gorman, Q.C., for Foothills Pipe Lines Ltd.

John Hopwood, Q.C., for Alberta Gas Trunk Line Co. Ltd.

W. G. Burke-Robertson, Q.C., for Alberta Gas Trunk Line (Canada) Ltd.

B. A. Crane, for Trans-Canada Pipelines Ltd.

J. R. Smith, Q.C., for Alberta Natural Gas Co. Ltd.

The judgment of Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ. was delivered by

THE CHIEF JUSTICE—On March 11, 1976, this Court gave judgment in an appeal from a decision of the Federal Court of Appeal which answered in the negative a question referred to it by the National Energy Board pursuant to s. 28(4) of the *Federal Court Act*, 1970-71-72 (Can.), c. 1. The question so referred was as follows:

Would the Board err in rejecting the objections and in holding that Mr. [Marshall] Crowe was not disqualified from being a member of the panel on grounds of reasonable apprehension or reasonable likelihood of bias?

This Court allowed the appeal, set aside the decision of the Federal Court of Appeal and declared that the question should be answered in the affirmative. It stated in its formal judgment on March 11, 1976 that reasons of the majority and dissenting judges would be delivered later. The reasons of the majority now follow.

The issue referred to the Federal Court of Appeal and which came by leave to this Court arose in connection with the organization of hearings by the National Energy Board to consider

Ian Binnie, et R. J. Sharpe, pour les appelants.

Hyman Soloway, c.r., et R. D. McGregor, pour l'Office national de l'énergie.

G. W. Ainslie, c.r., pour le procureur général du Canada.

D. M. M. Goldie, c.r., pour Pipeline de gaz arctique canadien Limitée.

R. J. Gibbs, c.r., et G. J. Gorman, c.r., pour Foothills Pipe Lines Ltd.

John Hopwood, c.r., pour Alberta Gas Trunk Line Co. Ltd.

W. G. Burke-Robertson, c.r., pour Alberta Gas Trunk Line (Canada) Ltd.

B. A. Crane, pour Trans-Canada Pipelines Ltd.

R. J. Smith, c.r., pour Alberta Natural Gas Co. Ltd.

Le jugement du juge en chef Laskin et des juges Ritchie, Spence, Pigeon et Dickson a été rendu par

LE JUGE EN CHEF—Le 11 mars 1976, cette Cour a rendu jugement sur le pourvoi à l'encontre de l'arrêt de la Cour d'appel fédérale qui a répondu négativement à la question déférée par l'Office national de l'énergie, en vertu du par. (4) de l'art. 28 de la *Loi sur la Cour fédérale*, 1970-71-72 (Can.), c. 1. La question déférée est la suivante:

L'Office ferait-il erreur en rejetant les objections et en statuant que M. [Marshall] Crowe n'est pas inhabile à faire partie du comité pour cause de crainte ou probabilité raisonnable de partialité?

Cette Cour a accueilli le pourvoi, infirmé l'arrêt de la Cour d'appel fédérale et statué qu'il fallait répondre affirmativement à la question. Le jugement du 11 mars 1976 précisait que les motifs de la majorité et des juges dissidents seraient remis plus tard. Voici les motifs de la majorité.

La question déférée à la Cour d'appel fédérale et, sur autorisation, soumise à cette Cour, a été soulevée à l'occasion de la préparation des audiences devant l'Office national de l'énergie pour l'exa-

(3) the question must be studied in the sole light of the documents submitted to the Court which, in addition to those already mentioned, are:

- (a) the proceedings before the Board on October 27, 1975;
- (b) the guidelines for northern pipelines issued by the Canadian Government on August 13, 1970;
- (c) a report of the National Energy Board, dated April 1975, entitled 'Canadian Natural Gas—Supply & Requirements' following public hearings held pursuant to Part I of the National Energy Board Act, from November 1974 to March 1975.

It is on this material that the Federal Court of Appeal unanimously came to its conclusion:

On the totality of the facts, which have been described only in skeletal form, we are all of the opinion that they should not cause reasonable and right minded persons to have a reasonable apprehension of bias on the part of Mr. Crowe, either on the question of whether present or future public convenience and necessity require a pipeline or the question of which, if any, of the several applicants should be granted a certificate.

I have already stated my concurrence with this reading of the facts.

I

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of

(3) la question doit être examinée à la seule lumière des documents soumis à la Cour, qui, en plus de ceux déjà mentionnés sont:

- a) les procédures devant l'Office, le 27 octobre 1975;
- b) les directives régissant les pipe-lines dans le nord, édictées par le gouvernement du Canada le 13 août 1970;
- c) un rapport de l'Office national de l'énergie, d'avril 1975, intitulé «Le Gaz naturel au Canada—Besoins & Approvisionnements», publié à la suite d'audiences publiques tenues conformément à la Partie I de la Loi sur l'Office national de l'énergie, de novembre 1974 à mars 1975.

C'est sur ces documents que la Cour d'appel fédérale s'est fondée pour conclure unanimement:

En nous fondant sur l'ensemble des faits, qui n'ont été exposés que sommairement, nous sommes tous d'avis qu'une personne juste et raisonnable n'aurait pas lieu de craindre que Crowe ne soit pas impartial sur la question de savoir si la commodité et la nécessité publiques, présentes et futures, rendent nécessaire la construction d'un pipe-line ni sur la question de savoir, si elle se pose, laquelle des diverses requérantes devrait obtenir le certificat.

J'ai déjà indiqué que je suis d'accord avec cette interprétation des faits.

I

La Cour d'appel a défini avec justesse le critère applicable dans une affaire de ce genre. Selon le passage précité, la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, M. Crowe, consciemment ou non, ne rendra pas une décision juste?»

Je ne vois pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de

bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

This is the proper approach which, of course, must be adjusted to the facts of the case. The question of bias in a member of a court of justice cannot be examined in the same light as that in a member of an administrative tribunal entrusted by statute with an administrative discretion exercised in the light of its experience and of that of its technical advisers.

The basic principle is of course the same, namely that natural justice be rendered. But its application must take into consideration the special circumstances of the tribunal. As stated by Reid, *Administrative Law and Practice*, 1971, at p. 220:

... 'tribunals' is a basket word embracing many kinds and sorts. It is quickly obvious that a standard appropriate to one may be inappropriate to another. Hence, facts which may constitute bias in one, may not amount to bias in another.

To the same effect, the words of Tucker L.J., in *Russell v. Duke of Norfolk and others*⁵, at p. 118:

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

In the case at bar, the test must take into consideration the broad functions entrusted by law to the Board. These are numerous and it is sufficient for our purpose to refer to the two main classes:

- (1) the advisory functions under Part II of the Act; s. 22 imposes upon the Board the obligation

partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité». Toutefois, les motifs de crainte doivent être sérieux et je suis complètement d'accord avec la Cour d'appel fédérale qui refuse d'admettre que le critère doit être celui d'une personne de nature scrupuleuse ou latillonne».

Telle est la façon juste d'aborder la question mais il faut évidemment l'adapter aux faits de l'espèce. La question de la partialité ne peut être examinée de la même façon dans le cas d'un membre d'un tribunal judiciaire que dans le cas d'un membre d'un tribunal administratif que la loi autorise à exercer ses fonctions de façon discrétionnaire, à la lumière de son expérience ainsi que de celle de ses conseillers techniques.

Évidemment, le principe fondamental est le même: la justice naturelle doit être respectée. En pratique cependant, il faut prendre en considération le caractère particulier du tribunal. Comme le remarque Reid, *Administrative Law and Practice*, 1971, à la p. 220:

[TRADUCTION] ... 'tribunal' est un mot fourre-tout qui désigne des organismes multiples et divers. On se rend vite compte que des normes applicables à l'un ne conviennent pas à un autre. Ainsi, des faits qui pourraient être des motifs de partialité dans un cas peuvent ne pas l'être dans un autre.

Lord Tucker abonde dans le même sens dans *Russell v. Duke of Norfolk and others*⁵, à la p. 118:

[TRADUCTION] Il n'existe pas à mon avis un principe qui s'applique universellement à tous les genres d'enquêtes et de tribunaux internes. Les exigences de la justice naturelle doivent varier selon les circonstances de l'affaire, la nature de l'enquête, les règles qui régissent le tribunal, la question traitée, etc.

En l'espèce, le critère employé doit prendre en considération les vastes fonctions conférées à l'Office par la loi. Elles sont nombreuses et, aux fins des présentes, il suffit d'en citer les deux principales catégories:

- (1) les fonctions consultatives, en vertu de la Partie II de la Loi; l'art. 22 impose à l'Office de

⁵ [1949] 1 All E.R. 109.

⁵ [1949] 1 All E.R. 109.

TAB F

Timothy S. B. Danson *Appellant*

v.

Her Majesty The Queen *Respondent*

INDEXED AS: DANSON v. ONTARIO (ATTORNEY GENERAL)

File No.: 20854.

1990: June 1; 1990: October 4.

Present: Lamer C.J.* and Wilson, Sopinka, Cory and McLachlin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Charter litigation — Factual basis — Proceedings brought by way of application to enforce Charter rights — Application not supported by facts — Whether or not Charter action can be brought absent factual basis — Canadian Charter of Rights and Freedoms, ss. 7, 15 — Constitution Act, 1867, s. 92(14) — Constitution Act, 1982, s. 52 — Rules of Civil Procedure, Rules 14.05(3)(h), 15.02(1), (3), 37.03(6), 57.07.

Courts — Jurisdiction — Mootness — Courts below considering issue in absence of factual situation — Fresh evidence adduced in Supreme Court of Canada — Whether the legal issue considered by the courts below rendered moot by the appellant's introduction of fresh evidence here.

Civil procedure — Commencement of proceedings — Application challenging constitutionality of Rules permitting assessment of costs against solicitors — Application made absent factual basis — Whether or not application can be brought absent factual basis — Rules of Civil Procedure, Rules 14.05(3)(h), 15.02(1), (3), 37.03(6), 57.07.

Rule 57.07 of Ontario's new *Rules of Civil Procedure* provided for the assessment of costs against solicitors personally in certain circumstances. Other rules to the same effect included Rules 37.03(6), 15.02(1) and (3). Appellant, an Ontario lawyer, sought to have these Rules declared to be of no force and effect as being beyond provincial competence. It was alleged that the Rules attacked the independence of the bar, exceeded the scope of s. 92(14) of the *Constitution Act, 1867* and violated ss. 7 and 15 of the *Canadian Charter of Rights*

* Chief Justice at the time of judgment.

Timothy S. B. Danson *Appellant*

c.

Sa Majesté la Reine *Intimée*

^a RÉPERTORIÉ: DANSON c. ONTARIO (PROCUREUR GÉNÉRAL)

N° du greffe: 20854.

^b 1990: 1^{er} juin; 1990: 4 octobre.

Présents: Le juge en chef Lamer* et les juges Wilson, Sopinka, Cory et McLachlin.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

^c

Droit constitutionnel — Charte des droits — Litige fondé sur la Charte — Contexte factuel — Procédure intentée par requête en exécution de droits reconnus par la Charte — Absence de faits à l'appui de la requête — ^d Une action en vertu de la Charte peut-elle être intentée sans contexte factuel? — Charte canadienne des droits et libertés, art. 7, 15 — Loi constitutionnelle de 1867, art. 92(14) — Loi constitutionnelle de 1982, art. 52 — Règles de procédure civile, règles 14.05(3)(h), 15.02(1), (3), 37.03(6), 57.07.

Tribunaux — Compétence — Caractère théorique — Examen de la question par les tribunaux d'instance inférieure en l'absence de contexte factuel — Nouveaux éléments de preuve présentés à la Cour suprême du Canada — La question juridique examinée par les tribunaux d'instance inférieure est-elle devenue théorique parce que l'appelant a produit de nouveaux éléments de preuve?

Procédure civile — Introduction de l'instance — ^g Requête contestant la constitutionnalité de règles autorisant la condamnation de procureurs aux dépens — Requête présentée en l'absence de contexte factuel — Une requête peut-elle être présentée en l'absence de contexte factuel? — Règles de procédure civile, règles ^h 14.05(3)(h), 15.02(1), (3), 37.03(6), 57.07.

La règle 57.07 des nouvelles *Règles de procédure civile* de l'Ontario prévoit qu'en certaines circonstances le procureur peut être condamné personnellement aux dépens. Les règles 37.03(6) et 15.02(1) et (3) ont le même effet. L'appelant, un avocat de l'Ontario, a demandé que ces règles soient déclarées inopérantes parce qu'elles ne relèvent pas de la compétence provinciale. Il allègue que les règles portent atteinte à l'indépendance du barreau, s'étendent au-delà de la portée du par. 92(14) de la *Loi constitutionnelle de 1867* et violent

* Juge en chef à la date du jugement.

and Freedoms. Appellant brought an application in the Supreme Court of Ontario pursuant to Rule 14.05(3)(h), which allows a proceeding to be brought by application where it is unlikely that there would be any material facts in dispute. The application contained no supporting affidavit, and no facts were alleged. The Attorney General of Ontario brought a motion to quash the application. The motions judge dismissed the motion. He held that it properly fell within Rule 14.05(3)(h) and that, apart from Rule 14.05(3)(h), the court had inherent jurisdiction to determine the constitutionality of the impugned rules by application. An appeal was dismissed by the Divisional Court but was allowed by the Ontario Court of Appeal.

Appellant filed a notice of application for leave to appeal to this Court before its "new Rules" providing for documentary applications had come into effect. The application made no mention of a motion to adduce fresh evidence. The respondent submitted a factum and did not attend the oral hearing. After respondent's factum on the application for leave had been filed, the appellant filed a notice of motion to adduce fresh evidence in the appeal. This fresh evidence included the appellant's opinions concerning the role of counsel, the dynamics of courtroom advocacy, and the manner in which the impugned rules undermine the independence of the bar. Also included was evidence of specific instances in which particular counsel were threatened with the invocation of the impugned rules. The Court did not have the benefit of oral or written argument in opposition to the motion to adduce fresh evidence. The application for leave to appeal and the application to adduce fresh evidence were granted on the date of the oral hearing.

At issue here were: (1) whether the legal issue considered by the courts below (i.e., can this application be heard without reference to any factual situation and without any affidavit evidence) had been rendered moot by the appellant's introduction of fresh evidence in this Court; and (2) whether the appellant could bring an application pursuant to s. 52 of the *Constitution Act, 1982* and/or to Rule 14.05(3)(h) of the *Ontario Rules of Civil Procedure* to seek a declaration that Rules 57.07, 37.03(6) and 15.02(1) and (3) of the *Ontario Rules of Civil Procedure* are unconstitutional, if no facts are alleged by the applicant in support of the relief claimed.

Held: The appeal should be dismissed.

les art. 7 et 15 de la *Charte canadienne des droits et libertés*. L'appelant a présenté une requête en Cour suprême de l'Ontario conformément à la règle 14.05(3)(h), qui prévoit qu'une instance peut être intentée par requête lorsque la question n'est pas susceptible de donner lieu à une contestation des faits pertinents. La requête n'était appuyée d'aucun affidavit et aucun fait n'était allégué. Le procureur général de l'Ontario a présenté une motion en annulation de la requête. Le juge qui a entendu la motion l'a rejetée. Il a conclu qu'elle relevait de la règle 14.05(3)(h) et que, sous réserve de la règle 14.05(3)(h), la cour avait le pouvoir inhérent de déterminer la constitutionnalité des règles contestées par requête. La Cour divisionnaire a rejeté l'appel mais la Cour d'appel de l'Ontario a accueilli l'appel de cette décision.

L'appelant a déposé un avis de requête en autorisation de pourvoi à notre Cour avant l'entrée en vigueur des «nouvelles règles» concernant la présentation par écrit de ces requêtes. L'avis ne mentionnait pas de requête en vue de présenter de nouveaux éléments de preuve. L'intimée a produit un mémoire et n'a pas comparu à l'audience. Après le dépôt du mémoire de l'intimée relativement à la requête en autorisation de pourvoi, l'appelant a déposé un avis de requête en vue de présenter de nouveaux éléments de preuve, comportant essentiellement des opinions de l'appelant sur le rôle de l'avocat, sur la dynamique de la plaidoirie devant le tribunal et sur la manière dont les règles contestées portent atteinte à l'indépendance du barreau ainsi que des exemples précis où on avait menacé des avocats d'invoquer les règles contestées. La Cour n'a pu bénéficier d'arguments oraux ou écrits en opposition à la requête en vue de présenter de nouveaux éléments de preuve. La requête en autorisation de pourvoi et la requête en vue de présenter de nouveaux éléments de preuve ont été accueillies le jour de l'audition.

Les questions en litige sont les suivantes: 1) la question de droit examinée par les juridictions inférieures (c.-à-d. la demande peut-elle être entendue en l'absence de tout contexte factuel et sans preuve par affidavit) est-elle devenue théorique en raison de la production par l'appelant de nouveaux éléments de preuve devant notre Cour? et 2) l'appelant peut-il présenter une demande en application de l'art. 52 de la *Loi constitutionnelle de 1982* ou de la règle 14.05(3)(h) des *Règles de procédure civile* de l'Ontario pour obtenir un jugement déclaratoire portant que les règles 57.07, 37.03(6) et 15.02(1) et (3) des *Règles de procédure civile* de l'Ontario sont inconstitutionnelles si le requérant ne présente aucun fait à l'appui du redressement demandé?

Arrêt: Le pourvoi est rejeté.

The appeal was not moot. A decision was required on the question of whether appellant's application under Rule 14.05(3)(h) could proceed without a factual underpinning. It would be highly unusual for this Court to accede to the submission that its own act of granting a motion to adduce fresh evidence in an appeal has rendered the appeal itself moot.

A proper factual foundation must exist before measuring legislation against the provisions of the *Charter*, particularly where the effects of impugned legislation are the subject of the attack. A distinction must be drawn between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". Adjudicative facts are those that concern the immediate parties. They are specific and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements.

The application, which seeks to attack the impugned rules on the basis of their alleged effects upon the legal profession in Ontario, should not be proceeded with because a *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. It would be difficult if not impossible for a motions judge to assess the merits of the appellant's application under Rule 14.05(3)(h) without evidence of those effects by way of adjudicative facts and legislative facts. Appellant has the facts needed to bring his challenge, by way of application, to a conclusion on the merits if he so chooses. He need not prove that the impugned rules were applied against him personally as standing was not an issue; but he must present admissible evidence that the effects of the impugned rules violate provisions of the *Charter*.

Cases Cited

Applied: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357; referred to: *R. v. Stolar*, [1988] 1 S.C.R. 480; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Re Residential Tenancies Act*, 1979, [1981] 1 S.C.R. 714; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110.

Le pourvoi n'est pas théorique. Il est nécessaire de déterminer si la requête de l'appelant en vertu de la règle 14.05(3)(h) peut être présentée sans contexte factuel. Il serait inusité de la part de la Cour d'accepter la prétention qu'un pourvoi est devenu théorique en raison de sa propre décision d'accueillir une requête en vue de présenter de nouveaux éléments de preuve.

Un contexte factuel adéquat doit exister avant qu'on puisse examiner une loi en regard des dispositions de la *Charte*, surtout lorsque le litige porte sur les effets de la loi contestée. Une distinction doit être établie entre deux catégories de faits dans un litige constitutionnel: «les faits en litige» et «les faits législatifs». Les faits en litige sont ceux qui concernent directement les parties au litige. Ils sont précis et doivent être établis par des éléments de preuve recevables. Les faits législatifs sont ceux qui établissent l'objet et l'historique de la loi, y compris son contexte social, économique et culturel. Ces faits sont d'une nature plus générale et les conditions de leur recevabilité sont moins sévères.

La requête, qui vise à contester les règles pour le motif qu'elles portent atteinte à la profession juridique en Ontario, ne devrait pas être présentée parce qu'une contestation relative à la *Charte* fondée sur la prétention que les effets de la loi contestée sont inconstitutionnels doit être appuyée par une preuve recevable concernant les effets contestés. Il serait difficile sinon impossible au juge saisi de la motion d'apprécier le bien-fondé de la requête que l'appelant présente en vertu de la règle 14.05(3)(h) sans preuve de ces effets par l'apport de faits en litige et de faits législatifs. L'appelant dispose des faits nécessaires pour obtenir par requête, s'il le veut, une conclusion sur le bien-fondé de sa contestation. Il n'a pas à établir que les règles contestées ont été appliquées dans son cas personnel puisque la qualité pour agir n'est pas en litige; mais il doit présenter des éléments de preuve recevables montrant que les effets des règles contestées violent les dispositions de la *Charte*.

Jurisprudence

Arrêt appliqué: *MacKay c. Manitoba*, [1989] 2 R.C.S. 357; arrêts mentionnés: *R. c. Stolar*, [1988] 1 R.C.S. 480; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *Rio Hotel Ltd. c. Nouveau-Brunswick (Commission des licences et permis d'alcool)*, [1987] 2 R.C.S. 59; Renvoi: *Loi anti-inflation*, [1976] 2 R.C.S. 373; Renvoi: *Loi de 1979 sur la location résidentielle*, [1981] 1 R.C.S. 714; Renvoi relatif à la *Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297; *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110.

TAB G

Mary Danyluk *Appellant*

v.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh and Joseph McBride Watson *Respondents*

INDEXED AS: DANYLUK v. AINSWORTH TECHNOLOGIES INC.

Neutral citation: 2001 SCC 44.

File No.: 27118.

2000: October 31; 2001: July 12.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Administrative law — Issue estoppel — Employee filing complaint against employer under Employment Standards Act seeking unpaid wages and commissions — Employee subsequently commencing court action against employer for wrongful dismissal and unpaid wages and commissions — Employment standards officer dismissing employee's complaint — Employer arguing that employee's claim for unpaid wages and commissions before court barred by issue estoppel — Whether officer's failure to observe procedural fairness in deciding employee's complaint preventing application of issue estoppel — Whether preconditions to application of issue estoppel satisfied — If so, whether this Court should exercise its discretion and refuse to apply issue estoppel.

In 1993, an employee became involved in a dispute with her employer over unpaid commissions. No agreement was reached, and the employee filed a complaint under the *Employment Standards Act* ("ESA") seeking

Mary Danyluk *Appelante*

c.

Ainsworth Technologies Inc., Ainsworth Electric Co. Limited, F. Jack Purchase, Paul S. Gooderham, Jack A. Taylor, Ross A. Pool, Donald W. Roberts, Timothy I. Pryor, Clifford J. Ainsworth, John F. Ainsworth, Kenneth D. Ainsworth, Melville O'Donohue, Donald J. Hawthorne, William I. Welsh et Joseph McBride Watson *Intimés*

RÉPERTORIÉ : DANYLUK c. AINSWORTH TECHNOLOGIES INC.

Référence neutre : 2001 CSC 44.

N° du greffe : 27118.

2000 : 31 octobre; 2001 : 12 juillet.

Présents : Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit administratif — Préclusion découlant d'une question déjà tranchée — Plainte déposée par une employée contre son employeur en vertu de la Loi sur les normes de l'emploi et réclamant le versement de salaire et commissions impayés — Action en dommages-intérêts pour congédiement injustifié et pour salaire et commissions impayés intentée subséquemment par l'employée contre l'employeur — Rejet de la plainte par l'agente des normes d'emploi — Préclusion découlant d'une question déjà tranchée plaidée par l'employeur à l'égard de la réclamation pour salaire et commissions impayés — L'inobservation de l'équité procédurale par l'agente des normes dans sa décision sur la plainte de l'employée empêche-t-elle l'application de cette doctrine? — Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont-elles réunies? — Dans l'affirmative, notre Cour doit-elle exercer son pouvoir discrétionnaire et refuser d'appliquer cette doctrine?

En 1993, un différend relatif à des commissions impayées a opposé une employée et son employeur. Aucune entente n'est intervenue et l'employée a déposé, en vertu de la *Loi sur les normes d'emploi* (la « LNE »),

unpaid wages, including commissions. The employer rejected the claim for commissions and eventually took the position that the employee had resigned. An employment standards officer spoke with the employee by telephone and met with her for about an hour. Before the decision was made, the employee commenced a court action claiming damages for wrongful dismissal and the unpaid wages and commissions. The ESA proceedings continued, but the employee was not made aware of the employer's submissions in the ESA claim or given an opportunity to respond to them. The ESA officer rejected the employee's claim and ordered the employer to pay her \$2,354.55, representing two weeks' pay in lieu of notice. She advised the employer of her decision and, 10 days later, notified the employee. Although she had no appeal as of right, the employee was entitled to apply under the ESA for a statutory review of this decision. She elected not to do so and carried on with her wrongful dismissal action. The employer moved to strike the part of the statement of claim that overlapped the ESA proceeding. The motions judge considered the ESA decision to be final and concluded that the claim for unpaid wages and commissions was barred by issue estoppel. The Court of Appeal affirmed the decision.

Held: The appeal should be allowed.

Although, in general, issue estoppel is available to preclude an unsuccessful party from relitigating in the courts what has already been litigated before an administrative tribunal, this is not a proper case for its application. Finality is a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a public policy doctrine designed to advance the interests of justice. Where, as here, its application bars the courthouse door against a claim because of an administrative decision made in a manifestly improper and unfair manner, a re-examination of some basic principles is warranted.

une plainte dans laquelle elle réclamait le versement de salaire impayé, y compris des commissions. L'employeur a rejeté sa demande de commissions et a finalement considéré qu'elle avait remis sa démission. Une agente des normes d'emploi a eu un entretien téléphonique avec l'employée, qu'elle a ensuite rencontrée pendant environ une heure. Avant que la décision soit rendue, l'employée a intenté une action en dommages-intérêts pour congédiement injustifié dans laquelle elle demandait le paiement du salaire et des commissions. La procédure prévue par la LNE a suivi son cours, mais l'employée n'a pas été avisée des arguments invoqués par l'employeur au sujet de sa plainte et elle n'a pas eu la possibilité d'y répondre. L'agente des normes d'emploi a rejeté la réclamation de l'employée et a ordonné à l'employeur de verser à cette dernière la somme de 2 354,55 \$, soit deux semaines de salaire, à titre d'indemnité de préavis. Elle a informé l'employeur de sa décision et, 10 jours plus tard, elle en a avisé l'employée. L'employée ne pouvait interjeter appel de plein droit mais elle avait, en vertu de la LNE, le droit de demander la révision de cette décision. Elle a choisi de ne pas le faire et a plutôt poursuivi son action en dommages-intérêts pour congédiement injustifié. L'employeur a présenté une requête en radiation de la partie de la déclaration qui recoupait la procédure engagée en vertu de la LNE. Le juge des requêtes a considéré que la décision fondée sur la LNE était définitive et il a conclu que la préclusion découlant d'une question déjà tranchée faisait obstacle à la réclamation pour salaire et commissions impayés. La Cour d'appel a confirmé la décision.

Arrêt : Le pourvoi est accueilli.

Bien que, en règle générale, la préclusion découlant d'une question déjà tranchée (*issue estoppel*) puisse être invoquée pour empêcher une partie déboutée de saisir les cours de justice d'une question qu'elle a déjà plaidée sans succès devant un tribunal administratif, il ne s'agit pas en l'espèce d'une affaire où il convient d'appliquer cette doctrine. Le caractère définitif des instances est une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est une doctrine d'intérêt public qui tend à favoriser les intérêts de la justice. Dans les cas où, comme en l'espèce, par suite d'une décision administrative prise à l'issue d'une procédure qui était manifestement inappropriée et inéquitable, l'application de cette doctrine empêche le recours aux cours de justice, il convient de réexaminer certains principes fondamentaux.

The preconditions to the operation of issue estoppel are threefold: (1) that the same question has been decided in earlier proceedings; (2) that the earlier judicial decision was final; and (3) that the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied.

The preconditions require the prior proceeding to be judicial. Here, the ESA decision was judicial. First, the administrative authority issuing the decision is capable of receiving and exercising adjudicative authority. Second, as a matter of law, the decision was required to be made in a judicial manner. While the ESA officers utilize procedures more flexible than those that apply in the courts, their adjudicative decisions must be based on findings of fact and the application of an objective legal standard to those facts.

The appellant denies the applicability of issue estoppel because, as found by the Court of Appeal, the ESA decision was taken without proper notice to the appellant and she was not given an opportunity to meet the employer's case. It is clear that an administrative decision which is made without jurisdiction from the outset cannot form the basis of an estoppel. Where an administrative officer or tribunal initially possessed the jurisdiction to make a decision in a judicial manner but erred in the exercise of that jurisdiction, the resulting decision is nevertheless capable of forming the basis of an estoppel. Alleged errors in carrying out the mandate are matters to be considered by the court in the exercise of its discretion. This result makes the principle governing estoppel consistent with the law governing judicial review in *Harelkin* and collateral attack in *Maybrun*.

In this case, the pre-conditions for issue estoppel have been met: the same issue is raised in both proceedings, the decision of the ESA officer was final for the purposes of the Act since neither the employer nor the employee took advantage of the internal review procedure, and the parties are identical. The Court must therefore decide whether to refuse to apply estoppel as a mat-

Les conditions d'application de la préclusion découlant d'une question déjà tranchée sont au nombre de trois : (1) que la même question ait été décidée dans une procédure antérieure; (2) que la décision judiciaire antérieure soit définitive; (3) que les parties ou leurs ayants droit soient les mêmes dans chacune des instances. Si le requérant réussit à établir l'existence des conditions d'application, la cour doit ensuite se demander, dans l'exercice de son pouvoir discrétionnaire, si cette forme de préclusion devrait être appliquée.

Suivant ces conditions, la décision antérieure doit être une décision judiciaire. En l'espèce, la décision fondée sur la LNE était judiciaire. Premièrement, le décideur administratif ayant rendu la décision peut être investi d'un pouvoir juridictionnel et il est capable d'exercer ce pouvoir. Deuxièmement, sur le plan juridique, la décision devait être prise judiciairement. Bien que les agents des normes d'emploi aient recours à des procédures plus souples que celles des cours de justice, leurs décisions juridictionnelles doivent s'appuyer sur des conclusions de fait et sur l'application à ces faits d'une norme juridique objective.

L'appelante conteste l'application de la préclusion découlant d'une question déjà tranchée parce que, conformément à la conclusion de la Cour d'appel, la décision fondée sur la LNE a été rendue sans qu'on donne à l'appelante un préavis suffisant et la possibilité de répondre aux prétentions de l'employeur. Il est clair qu'une décision administrative qui a au départ été prise sans la compétence requise ne peut fonder l'application de la préclusion. Lorsque le décideur administratif — fonctionnaire ou tribunal — avait initialement compétence pour rendre une décision de manière judiciaire, mais a commis une erreur dans l'exercice de cette compétence, la décision rendue est néanmoins susceptible de fonder l'application de la préclusion. Les erreurs qui auraient été commises dans l'accomplissement du mandat doivent être prises en considération par la cour de justice dans l'exercice de son pouvoir discrétionnaire. Cela a pour effet d'assurer la conformité du principe régissant la préclusion avec les règles de droit relatives au contrôle judiciaire énoncées dans l'arrêt *Harelkin* et celles relatives aux contestations indirectes énoncées dans l'arrêt *Maybrun*.

En l'espèce, les conditions d'application de la préclusion découlant d'une question déjà tranchée sont réunies : la même question est à l'origine des deux instances, la décision de l'agent des normes avait un caractère définitif pour l'application de la Loi en raison du fait que ni l'employeur ni l'employée ne se sont prévalus du mécanisme de révision interne, et les parties

ter of discretion. Here this Court is entitled to intervene because the lower courts committed an error of principle in failing to address the issue of the discretion. The list of factors to be considered with respect to its exercise is open. The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice, but not at the cost of real injustice in the particular case. The factors relevant to this case include the wording of the statute from which the power to issue the administrative order derives, the purpose of the legislation, the availability of an appeal, the safeguards available to the parties in the administrative procedure, the expertise of the administrative decision maker, the circumstances giving rise to the prior administrative proceeding and, the most important factor, the potential injustice. On considering the cumulative effect of the foregoing factors, the Court in its discretion should refuse to apply issue estoppel in this case. The stubborn fact remains that the employee's claim to commissions worth \$300,000 has simply never been properly considered and adjudicated.

sont les mêmes. La Cour doit par conséquent décider si elle doit exercer son pouvoir discrétionnaire et refuser d'appliquer la préclusion. En l'espèce, notre Cour a le droit d'intervenir puisque les tribunaux de juridiction inférieure ont commis une erreur de principe en omettant d'examiner la question de l'exercice du pouvoir discrétionnaire. La liste des facteurs à considérer pour l'exercice de ce pouvoir n'est pas exhaustive. L'objectif est de faire en sorte que l'application de la préclusion découlant d'une question déjà tranchée favorise l'administration ordonnée de la justice, mais pas au prix d'une injustice dans une affaire donnée. Parmi les facteurs pertinents en l'espèce, mentionnons : le libellé du texte de loi accordant le pouvoir de rendre l'ordonnance administrative, l'objet du texte de la loi, l'existence d'un droit d'appel, les garanties offertes aux parties dans le cadre de l'instance administrative, l'expertise du décideur administratif, les circonstances ayant donné naissance à l'instance administrative initiale et, facteur le plus important, le risque d'injustice. Vu l'effet cumulatif des facteurs susmentionnés, la Cour, dans l'exercice de son pouvoir discrétionnaire, doit refuser d'appliquer en l'espèce la préclusion découlant d'une question déjà tranchée. En effet, le fait demeure que la réclamation de l'employée visant des commissions totalisant 300 000 \$ n'a tout simplement jamais été examinée et tranchée adéquatement.

Cases Cited

Considered: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; **disapproved in part:** *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **referred to:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell v. The Queen* (1894), 22 S.C.R. 553; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223; *Robinson v. McQuaid* (1854), 1 P.E.I.R. 103; *Bell v. Miller* (1862), 9 Gr. 385; *Raison v. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong v. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin v. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasylvoulou v. Environment Secretary*, [1990] 2 A.C. 273; *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706; *McIntosh v. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schwenke v. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay v. Lafleur*, [1965] S.C.R. 12; *Thoday v. Thoday*, [1964] P. 181; *Machado*

Jurisprudence

Arrêt examiné: *Angle c. Ministre du Revenu national*, [1975] 2 R.C.S. 248; **arrêt critiqué en partie:** *Rasanen c. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267; **arrêts mentionnés:** *Re Downing and Graydon* (1978), 21 O.R. (2d) 292; *Farwell c. La Reine* (1894), 22 R.C.S. 553; *Wilson c. La Reine*, [1983] 2 R.C.S. 594; *R. c. Litchfield*, [1993] 4 R.C.S. 333; *R. c. Sarson*, [1996] 2 R.C.S. 223; *Robinson c. McQuaid* (1854), 1 P.E.I.R. 103; *Bell c. Miller* (1862), 9 Gr. 385; *Raison c. Fenwick* (1981), 120 D.L.R. (3d) 622; *Wong c. Shell Canada Ltd.* (1995), 15 C.C.E.L. (2d) 182; *Machin c. Tomlinson* (2000), 194 D.L.R. (4th) 326; *Hamelin c. Davis* (1996), 18 B.C.L.R. (3d) 112; *Thrasylvoulou c. Environment Secretary*, [1990] 2 A.C. 273; *R. c. Consolidated Maybrun Mines Ltd.*, [1998] 1 R.C.S. 706; *McIntosh c. Parent*, [1924] 4 D.L.R. 420; *British Columbia (Minister of Forests) c. Bugbusters Pest Management Inc.* (1998), 50 B.C.L.R. (3d) 1; *Schwenke c. Ontario* (2000), 47 O.R. (3d) 97; *Braithwaite c. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173; *Guay c. Lafleur*, [1965] R.C.S. 12; *Thoday c. Thoday*,

(7) The order of the adjudicator is not subject to a review under section 68 and is final and binding on the parties.

68. — (1) An employer who considers himself aggrieved by an order made under section 45, 48, 51, 56.2, 58.22 or 65, upon paying the wages ordered to be paid and the penalty thereon, if any, may, within a period of fifteen days after the date of delivery or service of the order, or such longer period as the Director may for special reasons allow and provided that the wages have not been paid out under subsection 72 (2), apply for a review of the order by way of a hearing.

(3) The Director shall select a referee from the panel of referees to hear the review.

(7) A decision of the referee under this section is final and binding upon the parties thereto and such other parties as the referee may specify.

IV. Analysis

The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal. However, estoppel is a doctrine of public policy that is designed to advance the interests of

(7) L'ordonnance de l'arbitre de griefs n'est pas susceptible de révision dans le cadre de l'article 68. Elle est sans appel et lie les parties.

68 (1) Après avoir versé le salaire qu'il lui est ordonné de payer ainsi que la somme à titre de pénalité qui s'y rapporte, s'il y a lieu, l'employeur qui s'estime lésé par une ordonnance rendue en vertu de l'article 45, 48, 51, 56.2, 58.22 ou 65 peut, dans les quinze jours qui suivent la remise ou la signification de l'ordonnance ou dans le délai plus long que le directeur peut autoriser pour des motifs particuliers, et à la condition que le salaire n'ait pas été versé en vertu du paragraphe 72 (2), demander que l'ordonnance fasse l'objet d'une révision par voie d'audience.

(3) Le directeur choisit un arbitre au sein du tableau des arbitres pour tenir l'audience de révision.

(7) La décision que l'arbitre prend en vertu du présent article est sans appel et lie les parties et les autres personnes que l'arbitre peut préciser.

IV. L'analyse

Le droit tend à juste titre à assurer le caractère définitif des instances. Pour favoriser la réalisation de cet objectif, le droit exige des parties qu'elles mettent tout en œuvre pour établir la véracité de leurs allégations dès la première occasion qui leur est donnée de le faire. Autrement dit, un plaideur n'a droit qu'à une seule tentative. L'appelante a décidé de se prévaloir du recours prévu par la LNE. Elle a perdu. Une fois tranché, un différend ne devrait généralement pas être soumis à nouveau aux tribunaux au bénéfice de la partie déboutée et au détriment de la partie qui a eu gain de cause. Une personne ne devrait être tracassée qu'une seule fois à l'égard d'une même cause d'action. Les instances faisant double emploi, les risques de résultats contradictoires, les frais excessifs et les procédures non décisives doivent être évités.

Le caractère définitif des instances est donc une considération impérieuse et, en règle générale, une décision judiciaire devrait trancher les questions litigieuses de manière définitive, tant qu'elle n'est pas infirmée en appel. Toutefois, la préclusion est

TAB H

No. 35305

July 4, 2013

Le 4 juillet 2013

Coram: McLachlin C.J. and Cromwell and
Wagner JJ.

Coram : La juge en chef McLachlin et les
juges Cromwell et Wagner

BETWEEN:

ENTRE :

Denis Rancourt

Denis Rancourt

Applicant

Demandeur

- and -

- et -

Joanne St. Lewis and University of Ottawa

Joanne St. Lewis et l'Université d'Ottawa

Respondents

Intimées

JUDGMENT

JUGEMENT

The application for leave to appeal from the judgment of the Ontario Superior Court of Justice, Number 11-51657, 2012 ONSC 6768, dated November 29, 2012, is dismissed with costs.

La demande d'autorisation d'appel du jugement de la Cour supérieure de justice de l'Ontario, numéro 11-51657, 2012 ONSC 6768, daté du 29 novembre 2012, est rejetée avec dépens.

J.S.C.C.
J.C.S.C.

TAB I

The Doctrine of Res Judicata in Canada

Third Edition

Donald J. Lange, B.A., LL.B., Ph.D. (Cantab.)



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2003 in *Toronto (City) v. Canadian Union of Public Employees, Local 79*,²⁵ the Supreme Court of Canada gave definitive recognition to the term “abuse of process by relitigation,” a term coined in the process of writing this book. This doctrine now joins the doctrines of issue estoppel and cause of action estoppel as one of the essential estoppel doctrines in the common law of Canada. With the influence of the rule in *Henderson* on issue estoppel and cause of action estoppel, the courts of Canada now have six essential estoppel doctrines to apply.²⁶

It is generally agreed that the doctrines are easier to state than to apply.²⁷ In *Toronto*, Arbour J. observed:

The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice.²⁸

2. A CORNERSTONE OF THE JUSTICE SYSTEM

The doctrine of *res judicata* is a cornerstone of the justice system in Canada. The foundation of the doctrine is traditionally grounded upon two policy considerations: firstly, the ground of public policy that it is in the interest of the public that an end be put to litigation, and secondly, the ground of individual right that no one should be twice vexed by the same cause.²⁹ These policy grounds are found in the reasons for judgment of Sedgewick J. in the Supreme Court of Canada case of *Clark v. Phinney*,³⁰ where they were considered as

²⁵ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64, per Arbour J. for the majority, per LeBel J. for the minority concurring.

²⁶ See the section on the six essential doctrines in this chapter, below.

²⁷ *R. v. Holmes* (1972), 25 C.R.N.S. 154 (Ont. Co. Ct.) at 161; *Re Tong*, [2008] B.C.J. No. 1174 (S.C.) at par. 43.

²⁸ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64 at par. 15, per Arbour J. for the majority, per LeBel J. for the minority concurring. In *R. v. Mahalingan*, [2008] S.C.J. No. 64 at par. 113, Charron J., for the minority dissenting, stated:

Identifying the elements of issue estoppel is deceptively simple, but applying the concept can prove rather complex, as evidenced by the considerable body of jurisprudence it has generated: see Lange for a useful discussion of the relevant jurisprudence.

²⁹ The foregoing sentences of this section were quoted, in whole or in part, in *Glenko Enterprises Ltd. v. Keller*, [2008] M.J. No. 65 (C.A.) at par. 31; *Lienaux v. 2301072 Nova Scotia Ltd.*, [2005] N.S.J. No. 247 (C.A.) at par. 15; leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 399; *Furlong v. Avalon Bookkeeping Services Ltd.*, [2004] N.J. No. 276 (C.A.) at par. 1; *Foreman v. Niven*, [2009] B.C.J. No. 2148 (S.C.) at par. 9; *Slade v. Lopelle*, [2008] O.J. No. 5208 (S.C.J.) at par. 17; *A Solicitor v. Law Society of New Brunswick*, [2004] N.B.J. No. 81 (Q.B.) at par. 23; *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, [2002] A.J. No. 317 (Q.B.) at par. 37. A similar phrase “a cornerstone of the judicial system” was used in *Sawridge Band v. Canada*, [2005] F.C.J. No. 745 (F.C.) at par. 382, per Russell J.; additional reasons at [2006] F.C.J. No. 842 (F.C.).

³⁰ *Clark v. Phinney* (1896), 25 S.C.R. 633 at 642–44, per Sedgewick J. Taschereau, King, and Girouard JJ. concurred. Gwynne J. provided separate reasons without reference to this statement

reasons for barring relitigation independent of the doctrine of *res judicata*. Sedgewick J. stated: “[T]hat judgment must conclude the parties [*res judicata*], and negative the defence here as well upon the ground of public policy expressed in the maxim *interest reipublicae ut sit finis litium* as upon the ground of individual right. *Nemo debet bis vexare pro eadem causâ*.”³¹ In *Re EnerNorth Industries Inc.*,³² Blair J.A., for the court, stated:

It is founded on two central policy concerns: finality (it is in the interest of the public that an end be put to litigation); and fairness (no one should be twice vexed by the same cause).

The reasons for the policy grounds were fully expressed in *Re F.E.L.*³³ Veit J. stated:

by Sedgewick J. The full Latin maxims are, respectively, *interest (or expedit) reipublicae ut sit finis litium* and *nemo debet bis vexari pro una et eadem causa*. In *Martin v. Goldfarb*, [2006] O.J. No. 2768 (S.C.J.) at par. 58, Perell J. translated the Latin maxims:

These ideas are linked to Latin maxims such as: “*interest reipublicae ut sit finis litium*” (“it is in the public interest that there should be an end to litigation”); and *nemo debet bis vexari si constet curiae quot sid pro una et eadem causa* (“no man ought to be twice troubled or harassed if it appears to the court that it is for one and the same cause”).

Additional reasons at [2006] O.J. No. 4557 (S.C.J.). The essential meanings of the maxims reach back beyond English jurisprudence to the days of Rome in varied Latin formulations. See Spencer Bower, Turner, and Handley, *The Doctrine of Res Judicata*, 3rd ed. (Butterworths, 1996), Appendix A, “*Res judicata* in Roman Law,” at 269; *R. v. Duhamel* (1984), 57 A.R. 204 (S.C.C.) at 208. In *Williams v. Kameka*, [2009] N.S.J. No. 470 (C.A.) at par. 12, Beveridge J.A., Oland and Fichaud JJ.A. concurring, stated:

It is a common law principle dating back hundreds of years. As G. Spencer Bower observed in his original text, *The Doctrine of Res Judicata* (London: Butterworth & Co., 1924) at 218 *et seq.*, it is a doctrine that, if not founded upon Roman law, is fortified and illustrated by it.

A colourful description of the second policy consideration is that of Master Funduk in *Ringrose v. Stevenson* (1982), 35 A.R. 62 (Master) at 69, referencing observations of Steer J. in *Kay v. Wirstiuk*, [1978] 1 W.W.R. 317 (Alta. T.D.) at 321: “endless wranglings and never-ending rehearings and never-ending re-openings must be avoided: *nemo debet bis vexari pro eadem causa*.”

³¹ In the common law *res judicata* case of *Re Florida Mining Co.* (1901), 8 B.C.R. 388 (C.A.) at 392, the court quoted a statement from *Lord v. R.* (1901), 31 S.C.R. 165 at 170, an appeal from Quebec under the Civil Code, which contained the proposition that the defence of *res judicata* may be waived by agreement of the parties. Such a proposition violates the policy grounds for *res judicata* and the court’s inherent jurisdiction to control its own process. But see the discussion of waiver and the doctrine of merger in *Zukowski v. Royal Insurance Co. of Canada*, [2000] A.J. No. 683 (C.A.), in the section on leading decisions and analysis in Chapter 3. See also *Watt v. Poor Boy Snack Foods Ltd.* (1994), 30 C.P.C. (3d) 300 (Alta. Master) at 303–04, where the implied ruling was that the inherent jurisdiction of the court to control its own process cannot be ousted by the consent of the parties to relitigate the question before the court after a tribunal decision. In *Grand River Enterprises v. Burnham*, [2005] O.J. No. 952 (C.A.) at par. 11, counsel filed an undertaking not to raise estoppel defences with respect to a certain issue at the invitation of the court.

³² *Re EnerNorth Industries Inc.*, [2009] O.J. No. 2815 (C.A.) at par. 53.

³³ *Re F.E.L.*, [2007] A.J. No. 1509 (Q.B.) at par. 24.

... I would have said that the matter was *res judicata* or issue estoppel. We do not continue to relitigate the same issue. There is a personal aspect to decisions supporting *res judicata*, and a public aspect to them. On the personal side, legal proceedings require an investment of an individual's personality, psyche and health. Legal proceedings are expensive and draining; they are challenging and should not be lightly undertaken. From the point of view of the institutions which are involved in such proceedings, while there is no personal involvement, there is certainly a very large financial involvement. From the point of view of the administration of justice, we know that our resources - judges, staff, court rooms, time - are limited and are required for a variety of issues, including, for example, criminal trials where the liberty of the subject is at stake. Because of all of these demands, we cannot just keep relitigating the same issues.

The courts in Canada traditionally ground *res judicata* upon these two policy considerations,³⁴ although *Clark v. Phinney* is rarely cited. Prior to the Supreme Court of Canada decision in *Toronto (City) v. Canadian Union of Public Employees, Local 79*,³⁵ many courts treated the public policy consideration as outweighing the consideration of the individual.³⁶ Thus, the social necessity to

³⁴ Early examples at the appellate level in different provinces are: *420746 B.C. Ltd. v. Misley* (1998), 157 D.L.R. (4th) 273 (B.C.C.A.) at 277; *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 34 M.P.L.R. (2d) 233 (Ont. Gen. Div.) at 240, 242, 244; affd (1997), 32 O.R. (3d) 651 (C.A.); *Comeau v. Breau* (1994), 145 N.B.R. (2d) 329 (C.A.) at 342, per Ryan J.A., Ayles J.A. concurring; *Manitoba Food & Commercial Workers Union, Local 832 (Retail Store Employees Union) v. Canada Safeway Ltd.* (1981), 120 D.L.R. (3d) 42 (Man. C.A.) at 46, per Monnin J.A. dissenting; *Fenerty v. Halifax (City)* (1920), 53 N.S.R. 457 (C.A.) at 463, per Ritchie J., Longley and Drysdale JJ. concurring. The Federal Court of Canada has cited the two policy grounds in *Apotex Inc. v. Merck & Co.*, [2002] F.C.J. No. 811 (C.A.) at par. 24; leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 323; *Jhamnat v. Canada (Minister of Employment & Immigration)* (1988), 6 Imm. L.R. (2d) 166 (Fed. T.D.) at 167-68; *R. v. St. Louis*, [1897] 5 Ex. C.R. 331 at 354-55.

³⁵ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64, per Arbour J. for the majority, per LeBel J. for the minority concurring.

³⁶ In *Charlebois v. Delap* (1896), 26 S.C.R. 221 at 249, King J. stated:

The necessity in the administration of justice of reaching a point where there shall be an end of litigation — *interest reipublicae ut sit finis litium* — which is perhaps the weightiest consideration operating to give to judgments recovered the effect which in all jurisprudence they are admitted to have, seems to be as pressing a necessity in a case where a company is a defendant.

Taschereau, Sedgewick, and Girouard JJ. concurred, Gwynne J. concurred partially in the result, revd on other grounds (*sub nom. Great North-West Central Railway v. Charlebois*) [1899] A.C. 114 (P.C.). In *Tsaoussis v. Baetz* (1998), 112 O.A.C. 78 (C.A.) at 84, Doherty J.A., for the court, stated: "Finality is so highly valued that it can be given priority over the justice of an individual case even where fundamental liberty interests and other constitutional values are involved." Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 518. In *Brown v. Marwiah* (1995), 36 C.P.C. (3d) 1 (N.S.S.C.) at 11, Saunders J. stated: "The public interest in seeing an end to their litigation remains of primary concern." Affd (1995), 39 C.P.C. (3d) 372 (N.S.C.A.). In *Bailey v. Guaranty Trust Co. of Canada* (1987), 39 D.L.R. (4th) 111 (Alta. C.A.) at 121-22, the court refused to follow *Reich v. Rutherford-McRae Ltd.* (1964), 47 W.W.R. 227 (B.C.C.A.). Belzil J.A., for the court, stated at 122:

respect the finality of judgments³⁷ was paramount. In *Toronto*,³⁸ the court rejected the notion of a finality principle as a separate doctrine or as an independent test to preclude relitigation. *Toronto* conclusively established that the test is one of justice or fairness. In other words, to give paramountcy to the policy consideration of the finality of litigation may cause injustice or unfairness to a litigant. Nevertheless, after *Toronto*, the British Columbia Court of Appeal³⁹ strongly reaffirmed the paramountcy of finality as a cornerstone of the justice system for both public and private litigants, quoting a lengthy statement from a decision of the Ontario Court of Appeal⁴⁰ and noting Ontario's embrace of the finality policy:

17 These passages confirm that cause of action estoppel is not merely a technical rule resting on expediency and arcane legal history. It goes to the heart of a system of civil justice that strives for the truth of the matter but recognizes that perfection is an unattainable goal and finality is a practical necessity.

Two other substantive considerations may be added to the two traditional policy grounds: first, the irrefutable legal presumption of the validity of judgments,⁴¹ and second, the court's reluctance to deprive a litigant of the

The case stands alone on the proposition that justice in the case supersedes the rules of *res judicata*. It is contrary to the authority of *Hoystead et al. v. Com'r of Taxation*, [1926] A.C. 155, [1926] 1 W.W.R. 286, and the other higher authority referred to and I would not follow it.

The overall answer to the respondents' argument is that principles governing *res judicata* are paramount to the interests of the litigants in the individual case.

These principles are twofold: the first is one of public policy, the second one of prevention of abuse of the court's process. The underlying rationale is to bring about a finality to litigation.

In *Re Blackwell*, [1962] O.R. 832 (C.A.) at 849, Schroeder J.A., for the majority, stated: "by the transcendent public interest that there should be finality and certainty in the adjudication of contentious matters." Leave to appeal to S.C.C. refused [1962] O.R. 849n (S.C.C.). See also *Apotex Inc. v. Merck & Co.*, [2002] F.C.J. No. 811 (C.A.) at par. 29; leave to appeal to S.C.C. refused [2002] S.C.C.A. No. 323.

³⁷ *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.) at 329; leave to appeal to S.C.C. granted; discontinued May 14, 1999 (S.C.C. #27179); *Jhaji v. Canada (Minister of Employment & Immigration)*, [1995] 2 F.C. 369 (T.D.) at 378.

³⁸ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64 at par. 55, *per* Arbour J. for the majority, *per* LeBel J. for the minority concurring. See the discussion of this case in the section on leading decisions and analysis in Chapter 4.

³⁹ *Revane v. Homersham*, [2006] B.C.J. No. 12 (C.A.) at par. 16–17, *per* Mackenzie J.A. for the court.

⁴⁰ *Tsaoussis (Litigation guardian of) v. Baetz*, [1998] O.J. No. 3516 (C.A.).

⁴¹ *Roberge v. Bolduc*, [1991] 1 S.C.R. 374 at 402. In *Children's Aid Society of the Niagara Region v. D.P.*, [2002] O.J. No. 4015 (S.C.J.) at par. 12, Quinn J. stated: "*Res judicata pro veritate accipitur* (commonly shortened to *res judicata*), loosely translated, means that a thing adjudicated is received as the truth."

opportunity to litigation adjudicated upon the merits.⁴² The shortness of life itself may also be a good reason.

Other policy considerations have been expressed by the courts in different ways.⁴³ They may be distilled into two general statements: firstly, the doctrine of *res judicata* should apply to avoid the scandal of conflicting decisions in order to promote confidence and predictability in the courts, and secondly, the doctrine should be applied to avoid the squandering of the courts' scarce resources⁴⁴ and the imposition of additional costs to the litigants.⁴⁵ In *Danyluk v.*

⁴² *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 (C.A.) at 329; leave to appeal to S.C.C. refused (1998), 167 N.S.R. (2d) 400n (S.C.C.); *Bayhold Financial Corp. v. Clarkson Co.* (1985), 70 N.S.R. (2d) 70 (C.A.) at 70; *Haneman v. Midland Doherty Ltd.* (1987), 82 N.S.R. (2d) 163 (T.D.) at 169. In *Chapman v. Canada*, [2001] B.C.J. No. 775 (S.C.) par. 61, after referring to the principles involved in applying estoppel and related doctrines, Melnick J. stated: "They are obviously high standards based upon the important principle that a litigant is entitled to his or her day in court, within the limits reasonably and justly proscribed by law."

⁴³ *R. v. Duhamel* (1984), 57 A.R. 204 (S.C.C.) at 208-09; *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2001] O.J. No. 3239 (C.A.) at par. 79; *affd* on another ground [2003] S.C.J. No. 64; *Ladner v. Ladner*, [2004] B.C.J. No. 1311 (C.A.) at par. 39; *Machin v. Tomlinson*, [2000] O.J. No. 4338 (C.A.) at par. 11; *McQuillian v. Native Inter-Tribal Housing Co-operative Inc.* (1999), 42 O.R. (3d) 46 (C.A.) at 51; *Wagner v. Matheson* (1994), 49 A.C.W.S. (3d) 597 (Ont. Gen. Div.) at 8; *affd* for the reasons given by the lower court at (1997), 71 A.C.W.S. (3d) 1164 (Ont. C.A.); *Hamelin v. Davis* (1996), 18 B.C.L.R. (3d) 85 (C.A.) at 102-03, *per* Newbury J.A. dissenting; leave to appeal to S.C.C. refused (1997), 88 B.C.A.C. 160n (S.C.C.); *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.) at 289 *per* Carthy J.A.; leave to appeal to S.C.C. refused (1994), 19 O.R. (3d) xvi (note) (S.C.C.); *O'Brien v. Canada (Attorney General)* (1993), 153 N.R. 313 (Fed. C.A.) at 316; *Solomon v. Smith* (1987), 45 D.L.R. (4th) 266 (Man. C.A.) at 275, *per* Lyons J.A., O'Sullivan and Philip J.J.A.; *R. v. Sweetman*, [1939] O.R. 131 (C.A.) at 138; *R. v. Smyth*, [2007] O.J. No. 1946 (S.C.J.) at par. 82; *Freshway Specialty Foods Inc. v. Map Produce LLC*, [2005] B.C.J. No. 2302 (S.C.) at par. 51; *Binder v. Pratt*, [2004] O.J. No. 405 (S.C.J.) at par. 26; *Trang v. Alberta (Director of Edmonton Remand Centre)*, [2002] A.J. No. 890 (Q.B.) at par. 52; *Gartree Investments Ltd. v. Cartree Enterprises Ltd.*, [2002] O.J. No. 753 (S.C.J.) at par. 46; *Alberta Treasury Branches v. Ghermezian*, [2001] A.J. No. 882 (Q.B.) at par. 23; *Robertson v. Gamble* (1997), 33 O.R. (3d) 461 (Gen. Div.) at 467; *Schwenke v. Ontario* (1996), 1 C.P.C. (4th) 35 (Ont. Gen. Div.) at 42; additional reasons at [1997] O.J. No. 1664 (Gen. Div.); *affd* on other grounds (2000), 47 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 168; *Brown v. Marwiew* (1995), 36 C.P.C. (3d) 1 (N.S.S.C.) at 8; *affd* on other grounds (1995), 39 C.P.C. (3d) 372 (N.S.C.A.); *Royal Bank v. Elpat Holdings Ltd.* (1990), 74 Alta. L.R. (2d) 207 (Q.B.) at 212; *Germesheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.) at 687.

⁴⁴ In *Shaw v. BCE Inc.*, [2003] O.J. No. 5481 (S.C.J.) at par. 9, Farley J. stated that a litigant "cannot reasonably be permitted to repetitiously relitigate and clog up the court system and so limit its accessibility to other litigants in other cases."

⁴⁵ In *Lim v. Lim* (1999), 180 D.L.R. (4th) 87 (B.C.C.A.) at 92-93; leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 576; the court observed that the policy against relitigation is a principle of judicial economy which is embodied in rules of procedure, whose object is to secure a just, speedy, and inexpensive determination of every proceeding on its merits. To this observation may be added the procedural requirement that, as far as possible, multiplicity of proceedings shall be avoided and the procedural encouragement to consolidate proceedings to achieve judicial economy.

Ainsworth Technologies Inc.,⁴⁶ Binnie J., speaking for the Supreme Court of Canada, stated:

An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

Res judicata is a "fundamental doctrine of the justice system."⁴⁷ Where it applies, it serves as an equitable estoppel.⁴⁸ The test is to arrive at justice or fairness. There must be "a judicial balance between finality, fairness, efficiency, and authority of judicial decisions."⁴⁹ Of the test of justice, Jackson J.A., in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*,⁵⁰ stated:

The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries with its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard.

Of the test of fairness, Conrad J.A., in *Wavel Ventures Corp. v. Constantini*,⁵¹ stated:

⁴⁶ *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46 at par. 18.

⁴⁷ *R. v. Van Rassel*, [1990] 1 S.C.R. 225 at 238; *Maynard v. Maynard*, [1951] 1 D.L.R. 241 (S.C.C.) at 253, *per* Cartwright J.; leave to appeal to Privy Council denied [1952] 1 S.C.R. vii (note) (Ont. P.C.); *Winter v. J.A. Dewar Co.* (1929), 41 B.C.R. 336 (C.A.) at 340, *per* McPhillips J.A.; *Wong v. Canada (Minister of Employment & Immigration)* (1991), 49 Admin. L.R. 35 (Fed. T.D.) at 45. This sentence was quoted in *Sackville (Town) v. Canadian Union of Public Employees, Local 1188*, [2007] N.B.J. No. 97 (C.A.) at par. 36.

⁴⁸ *Fournogerakis v. Barlow*, [2008] B.C.J. No. 922 (C.A.) at par. 16.

⁴⁹ *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] S.C.J. No. 64 at par. 15 *per* Arbour J. for the majority, *per* LeBel J. for the minority concurring.

⁵⁰ *Iron v. Saskatchewan (Minister of the Environment & Public Safety)*, [1993] 6 W.W.R. 1 (Sask. C.A.) at 21, *per* Jackson J.A. dissenting, and at 20, observing that whereas in the early days of the development of the doctrine of *res judicata*, a strict interpretation of the doctrine precluded a second action, today the second action would proceed; leave to appeal to S.C.C. refused [1993] 7 W.W.R. lxviii (note) (S.C.C.). In *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 550–51, Laskin J., for the minority, stated:

The basis of issue estoppel as well as of cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see *New Brunswick R. Co. v. British and French Trust Corp. Ltd.*, [1939] A.C. 1 at p. 19).

⁵¹ *Wavel Ventures Corp. v. Constantini*, [1997] 4 W.W.R. 194 (Alta. C.A.) at 216, *per* Conrad J.A., dissenting; application for rehearing refused (March 17, 1997), Doc. Edmonton Appeal 9503-0552-AC (Alta. C.A.). In *Danyluk v. Ainsworth Technologies Inc.* (1998), 42 O.R. (3d) 235 (C.A.) at 248, Rosenberg J.A., for the court, stated: "The private and public interests in putting an end to litigation must be balanced with the importance of ensuring fairness to the parties." Reversed on another ground [2001] S.C.J. No. 46. See also *McQuillian v. Native Inter-Tribal Housing Co-operative Inc.* (1999), 42 O.R. (3d) 46 (C.A.) at 51; *Ernst & Young Inc. v. Central Guaranty Trust Co.*, [2001] A.J. No. 148 (Q.B.) at par. 23; *BMF Trading v. Abraxis Holdings Ltd.*, [2001] B.C.J. No. 1603 (S.C.) at par. 19; *Fire Clay Minerals, Inc. v. Clark, Wilson*, [1999] B.C.J. No. 1957 (S.C.) at par. 71–72; *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237 (Ont.

The principles are easily stated, less easily applied. Generally speaking, *res judicata* is a rule of fairness. The administration of justice could not sustain repeated attacks on judgments resulting in retrials of issues and causes. Being a rule of fairness, however, it must not deprive a litigant of a retrial in whole, or with respect to issues, in the appropriate circumstances. The authorities recognize the need to balance the competing issues of fairness, and exceptions to the doctrine of *res judicata* [that] have developed.

Suing once in the court system is usually enough of a challenge and enough of a "trial" for most litigants and so the policy grounds of *res judicata* seem quite obvious to them: "Of course, you can only sue once." But there are those litigants who will not let go, leading to some colourful comments from the courts:

In a very general sense, it is clear that the Kadziolkas have throughout these protracted proceedings engaged in a process of recycling their various claims. On each turn of the judicial wheel these core claims have been refined and further claims added.⁵²

He has casually and baldly hurled conspiracy allegations against the provincial Crown and the Dyer, Brown law firm thinking that the creation of new targets for his attacks will somehow enable him to reach another forum where he can revive already litigated and unsuccessful positions and claims.⁵³

In popular language, I refer to "one kick at the can," so to speak. In my opinion, the claimant company here is attempting to do exactly that, to have yet another kick at the can with the argument that, yes it is the same can that is to be kicked,

Gen. Div.) at 244; additional reasons at (1995), 59 C.P.R. (3d) 313 (Ont. Gen. Div.); leave to appeal refused (1995), 60 C.P.R. (3d) 459 (Ont. Gen. Div.); *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.) at 437. In *Barrett v. Krebs* (1995), 174 A.R. 59 (C.A.) at 63, Kerans J.A., for the court, stated:

The only basis upon which I could be persuaded to undermine the idea of *res judicata* in that way is if I became convinced that the original rule worked such an unjust result that it could no longer be countenanced.

This statement about unjust result is not to be taken as a statement about *res judicata*. The case was about reconsidering a legal rule adopted by the court in an earlier decision. The statement is about the doctrine of *stare decisis* and should be read that way. The erred statement is also quoted in *Anderson v. Amoco Canada Oil & Gas* (1998), 63 Alta. L.R. (3d) 1 (Q.B.) at 58.

⁵² *Royal Bank of Canada v. Kadziolka* (1999), 172 Sask. R. 216 (C.A.) at 226, *per* Wakeling J.A. for the court. The Kadziolkas and the Royal Bank of Canada relitigated again in *Royal Bank of Canada v. Kadziolka*, [2000] S.J. No. 799 (Q.B.); *Royal Bank of Canada v. Kadziolka*, [2004] S.J. No. 2 (Q.B.); *Royal Bank of Canada v. Kadziolka*, [2004] S.J. No. 375 (C.A.).

⁵³ *Celik (c.o.b. Oxford Building Maintenance Engineering) v. St. Paul Insurance Companies*, [1999] O.J. No. 4149 (S.C.J.) at par. 42, *per* Killeen J.; *affd* for the reasons of the lower court [2000] O.J. No. 1614, 1615 (C.A.); leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 321, 324.

but we are worried more now about the lid on the can or the label on the can. With respect, that cannot happen.⁵⁴

The taxpayers of Canada and Alberta pay a lot of money to provide for the Provincial Court of Alberta and the Court of Queen's Bench of Alberta. Lawsuits are not sporting events. It is not the Court's function to fill the lacuna in people's lives. That is what movie theatres are for.⁵⁵

But no judicial comment is more descriptive of the mania of relitigation than that found in *Smith v. Merchants Bank of Canada*.⁵⁶ Meredith C.J.C.P. stated:

[A]fter careful perusal of all the writings now before us upon this appeal, and an application of my knowledge gained by long experience, in dealing with cases in which the minor, litigious, mania has been displayed, to all the facts of this case, my conclusion is quite in accord with that of the Judge of first instance, and goes this much further than anything expressed by him: that not only the public interests, but the interests of the plaintiff himself, demand that an end be put to this persistent, futile, and senseless litigation, which he has been carrying on, spasmodically, for nearly 25 years: to that extent which seems to me to be very like making a farce of the proceedings of the Court.

3. THE SIX ESSENTIAL DOCTRINES

There are six essential estoppel doctrines developed by the courts of Canada. Each one of these doctrines may be applied with rigour based on its precise meaning. In their most concise definitions, the six essential estoppel doctrines are:

- (1) Issue estoppel bars an issue which has actually been decided in the first proceeding.
- (2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.
- (3) Cause of action estoppel, the true *res judicata*, bars a cause which has actually been decided in the first proceeding.
- (4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.
- (5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.

⁵⁴ *Peachland Heights Properties Ltd. v. Strata Corp.* KAS 1080, [2006] B.C.J. No. 372 (Prov. Ct.) at par. 7, *per* Lemiski J.

⁵⁵ *Moore (c.o.b. Lonepine Kennels) v. Tkachyk*, [2002] A.J. No. 877 (Q.B. Master) at par. 13, *per* Master Funduk.

⁵⁶ *Smith v. Merchants Bank of Canada* (1917), 38 D.L.R. 321 (Ont. C.A.) at 327-28, *per* Meredith C.J.C.P. dissenting.

TAB J

Case Name:
El v. Henry

:Nanya-Shaabu:El
v.
Ken youth Lucien Henry

[2011] S.C.C.A. No. 138

[2011] C.S.C.R. no 138

File No.: 34172

Supreme Court of Canada

Record created: February 24, 2011.

Record updated: July 14, 2011.

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Status:

Application for leave to appeal dismissed with costs (without reasons) July 14, 2011.

Catchwords:

Civil procedure -- Vexatious litigant proceedings -- Security for costs -- Whether the Court of Appeal erred in making vexatious litigant declaration, ordering security for costs or prohibiting applicant from commencing or continuing any appeal, action or proceeding against the respondent, or for administration or probate of his late father's estate, without leave of the court.

Case Summary:

The applicant, Mr. El, is the respondent's nephew. Mr. El and his mother sued the respondent and several others, claiming that they were somehow responsible for or liable in damages for the death of Mr. El's father, the respondent's brother, who died of a heart attack shortly after being released from hospital. On motion of the respondent, the Court of Queen's Bench struck out the statement of claim and dismissed the action. Mr. El commenced an appeal of that order.

On motion by the Respondent, a single judge of the Alberta Court of Appeal, inter alia, declared the Applicant, Mr. El, to be a vexatious litigant, prohibited him from commencing or continuing any appeal, action or proceeding against the respondent without leave of the court, and ordered that he pay security for costs in respect of any continuation of his appeal from the order of the Queen's Bench. Leave to appeal from that order to a panel in the Court of Appeal was not sought.

Counsel:

:Nanya-Shaabu:El, for the motion.

Aaron K.A. Peterkin (Carr & Company), contra.

Chronology:

1. Application for leave to appeal:

FILED: February 24, 2011. S.C.C. Bulletin, 2011, p. 594.
SUBMITTED TO THE COURT: June 13, 2011. S.C.C. Bulletin,
2011, p. 921.
DISMISSED WITH COSTS: July 14, 2011 (without reasons),
S.C.C. Bulletin, 2011, p. 1083.
Before: Binnie, Abella and Rothstein JJ.

The miscellaneous motion is dismissed without costs. The application for leave to appeal is dismissed with costs for lack of jurisdiction.

Procedural History:

Judgment at first instance: Respondent's motion to strike Applicant's statement of claim, granted; Applicant's claim, dismissed.
Court of Queen's Bench of Alberta, Sanderman J., February 4, 2010.

Judgment on appeal: Respondent's motion for order, inter alia, declaring Applicant a vexatious litigant, granted. Court of Appeal of Alberta (Edmonton), Slatter J.A., October 14, 2010.
Neutral citation: 2010 ABCA 312; [2010] A.J. No. 1202.

e/qlhbb

TAB K

Case Name:

Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce

**Re Hillmond Investments Limited and
Canadian Imperial Bank of Commerce**

[1996] O.J. No. 1772

29 O.R. (3d) 612

135 D.L.R. (4th) 471

91 O.A.C. 54

49 C.P.C. (3d) 262

63 A.C.W.S. (3d) 6

Nos. C22198 and M17331

Ontario Court of Appeal

Finlayson, Mckinlay and Arbour JJ.A.

May 22, 1996

Counsel:

John R. Sproat, for appellant.

Susan J. Heakes, for respondent.

The judgment of the court was delivered by

1 FINLAYSON J.A.:-- Canadian Imperial Bank of Commerce ("CIBC"), the respondent in this appeal, moves to quash the appeal brought by Hillmond Investments Limited ("Hillmond") from the order of the Honourable Mr. Justice A.W. Davidson of the Ontario Court (General Division) dated June 9, 1995, wherein Davidson J. denied Hillmond leave to appeal from the interim arbitral award of the Honourable R.E. Holland, Q.C. (the "arbitrator"), dated March 2, 1995.

Supreme Court said that "this is not a case, moreover, where the Federal Court of Appeal mistakenly declined jurisdiction". Similarly, in *Industrial Acceptance Corp.*, supra, the Supreme Court of Canada (at p. 655) said that an order granting leave to appeal would not be protected where the judge granting it had disregarded some essential statutory right of one of the parties. Two examples were given: *Williams v. Grand Trunk Railway Co.* (1905), 36 S.C.R. 321, and *Montreal Tramways Co. v. C.N.R.* (Motion, October 6, 1931). Both cases involved a judge in chambers granting an application for leave to appeal without giving the responding party an opportunity to be heard.

37 The general principle relating to redress in exceptional circumstances was stated succinctly by Cartwright J. in *Canadian Utilities Ltd. v. Deputy Minister of National Revenue*, supra at p. 63:

It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, **provided that the tribunal has not mistakenly declined jurisdiction** but has reached a decision on the merits of the application.

(Emphasis added)

Cartwright J. then continued in language applicable to this case, also at p. 63:

In the case at bar it is clear that the learned President considered the applications for leave to appeal on their merits and reached the conclusion that the questions on which leave was sought were not questions of law and that, in any event, this was not the kind of case in which leave should be given. **In no sense did he decline jurisdiction.**

(Emphasis added)

38 In this province, the limited appellate review of the granting or denial of leave to appeal by a General Division judge is exercised by the Divisional Court, not the Court of Appeal, because the order, however mistaken, still is not a final order: it remains interlocutory. I hasten to add that there is no suggestion on this record that procedural or other defects caused Davidson J. to mistakenly decline jurisdiction in considering whether to grant leave. But if he had, the procedural route for relief from an order refusing or granting leave is set out in s. 19(1)(b) of the C.J.A. as follows:

19(1) An appeal lies to the Divisional Court from,

(b) an interlocutory order of a judge of the General Division with leave as provided in the rules of court;

Furthermore, leave will only be granted under s. 19(1)(b) if it can be shown that Davidson J. declined jurisdiction and not merely that he should have recognized errors in law on the part of the arbitrator. An examination of the latter would simply be a rehearing of the original motion.

39 I have not dealt with the argument of counsel for the respondent Hillmond that an analysis of the role of the courts under other provisions of the Arbitration Act, 1991 indicates, by implication, that the legislature intended leave orders under s. 45 to be treated as final orders. It would take

very clear language to lead me to such a conclusion having regard to the well-established jurisprudence referred to above. The argument, with respect, is untenable. The appellant further submitted that the order of Davidson J. was not a discretionary order, but the issue whether the order was discretionary is irrelevant: discretionary or not, it remains interlocutory.

Conclusion

40 The ultimate question on the motion to quash this appeal is whether leave was required before this court had jurisdiction to entertain the appeal. On authority, it clearly was. It is also established that our court will not permit an appellant to circumvent the requirement of obtaining leave to appeal by complaining about the correctness of the decision of the judge or tribunal that declined to give that leave. An order granting or refusing leave is not a final order. In the very limited circumstances in which such an interlocutory order could be reviewed, redress must be had to the Divisional Court with leave.

41 Accordingly, the answer to issue (1) is that, failing leave, there is no appeal from an award of an arbitrator under the Arbitration Act, 1991. The answer to issue (2) is that the order under appeal is not a final order because it does not dispose of the issues between the parties and, accordingly, s. 6(1)(b) of the C.J.A. is not available to the parties. As to issue (3), the appellant's argument that the refusal of the judge to grant leave has the effect of conferring final order status on the decision of the arbitrator is of no consequence. The refusal to grant leave may well mean that the award of the arbitrator is final as between the parties, but that is what the legislature intended under the provisions of s. 45 of the Arbitration Act, 1991.

42 For the reasons set out above, I would allow the respondent's motion and quash the appeal with costs to the respondent.

TAB L

Case Name:
Lloyd v. Bush

Between
Leslie Gail Lloyd and Jason Lloyd, Plaintiffs (Appellants),
and
David P. Bush, 818601 Ontario Inc. c.o.b. as MacDonald's
Propane, The Corporation of the County of Lennox and
Addington, and The Corporation of the Town of Greater Napanee,
Defendants (Respondents)

[2012] O.J. No. 2343

2012 ONCA 349

292 O.A.C. 251

110 O.R. (3d) 781

350 D.L.R. (4th) 81

215 A.C.W.S. (3d) 75

Docket: C51756

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, R.P. Armstrong and S.E. Lang JJ.A.

Heard: October 31, 2011.

Judgment: May 28, 2012.

(71 paras.)

Legal profession -- Judges -- Powers and duties -- Appeal by plaintiff from trial judgment on basis of reasonable apprehension of bias allowed -- New trial ordered -- Appellant's action for injuries suffered in motor vehicle accident was dismissed -- Trial judge insisted that appellant's counsel improperly raised allegation of fraud against respondent Town after appellant's expert testified -- Trial judge made negative comment regarding appellant's credibility midway through trial -- Expert's

testimony did not amount to allegation of fraud -- Trial judge's interjection on fraud allegation and his reference in open court concerning appellant's negative credibility raised reasonable apprehension of bias.

Professional responsibility -- Self-governing professions -- Professions -- Legal -- Judges -- Appeal by plaintiff from trial judgment on basis of reasonable apprehension of bias allowed -- New trial ordered -- Appellant's action for injuries suffered in motor vehicle accident was dismissed -- Trial judge insisted that appellant's counsel improperly raised allegation of fraud against respondent Town after appellant's expert testified -- Trial judge made negative comment regarding appellant's credibility midway through trial -- Expert's testimony did not amount to allegation of fraud -- Trial judge's interjection on fraud allegation and his reference in open court concerning appellant's negative credibility raised reasonable apprehension of bias.

Appeal by the plaintiff from trial judgment on the basis of a reasonable apprehension of bias. The appellant sued the respondents for injuries suffered as a result of a serious motor vehicle accident involving a propane truck driven by the respondent Bush. The appellant also sued the County and the Town for failure to provide proper winter maintenance on the County road. The Town provided winter maintenance on the County roads. The action was settled with the driver and the owner of the propane truck. The action against the County and Town was dismissed. During the trial, the trial judge found that counsel for the appellant improperly raised an allegation of fraud against the Town after an expert witness for the appellant testified that the Town's records regarding the road clearing and salting on the date of the accident were inconsistent with a photograph of the road taken on that date. Although appellant's counsel denied that he made an allegation of fraud, the trial judge insisted that an allegation of fraud was being made by the appellant without having pleaded it. The trial judge again referred to this alleged fraud when addressing costs. Midway through trial, the trial judge made a statement regarding the appellant's credibility by referring to her falsified curriculum vitae, which indicated that she had received a bachelor degree. The appellant had testified that she was one credit short but had intended to obtain the credit at the time.

HELD: Appeal allowed. New trial ordered. The appellant had met the test for reasonable apprehension of bias. The trial judge erred when he concluded that the expert's testimony amounted to an allegation of fraud that had not been pleaded. This error occurred in part because the trial judge came to this conclusion on his own initiative. There was no basis for the trial judge to suggest that the appellant was alleging fraud or alleging that the Town had "cooked its books". What was raised by the expert witness were everyday issues of reliability and credibility, not fraud. The trial judge's characterization of the expert's evidence that the work reflected in the records was inconsistent with the state of the road surface as an assertion of fraudulent record-keeping by the Town was entirely erroneous. Coupled with the persistence with which the trial judge asserted this erroneous characterization, it clearly would have suggested that the trial judge appeared to have the view that the appellant was asserting a position that could not possibly be true and doomed the appellant's case. A fully informed reasonable observer would conclude that at this relatively early point in the trial, and particularly after the repetition of the error later in the trial, the trial judge seemed to have closed his mind to the central issue in the case and would not decide fairly. The seemingly gratuitous statement of the trial judge concerning the appellant's credibility in the context of settlement discussions before the conclusion of the trial was not appropriate. This intervention raised a serious issue concerning the trial judge's impartiality. The reference made by the trial judge in open court concerning

the appellant's negative credibility raised a reasonable apprehension of bias, particularly when considered in conjunction with the trial judge's interjection with respect to the allegation of fraud and its apparent impact on his perception of the appellant's case.

Appeal From:

On appeal from the judgment of Justice R. F. Scott of the Superior Court of Justice, dated January 27, 2010, with reasons reported at 2010 ONSC 669 and the costs order dated July 14, 2011, with reasons at 2011 ONSC 3448.

Counsel:

R. Steven Baldwin, for the appellants.

Kirk F. Stevens and Stuart Zacharias, for the respondents.

The judgment of the Court was delivered by

R.P. ARMSTRONG J.A.:--

Introduction

1 This appeal raises the reasonable apprehension of bias of the trial judge in respect of two matters:

- (i) His conclusion that counsel for the plaintiffs/ appellants had improperly raised an allegation of fraud against the Town of Greater Napanee without having pleaded such allegation in the statement of claim; and
- (ii) His comments on the credibility of the plaintiff/appellant, Leslie Gail Lloyd, before the trial was concluded.

Although the appellants raised other issues it is unnecessary to deal with them to decide this appeal.

2 As it is my view that it is necessary to order a new trial, I will refer only to the evidence that leads me to that conclusion.

The Background

3 On the morning of January 3, 2003, Leslie Gail Lloyd drove her car from the home of her husband's parents on County Road 9, southwest of Napanee. She was intending to pick up her sister-in-law in Napanee and drive her to the local hospital. It was snowing and it had been snowing during the night. The road was snow packed. After driving a very short distance (about 400 metres), Ms. Lloyd and her automobile were involved in a horrendous accident with a loaded propane truck driven by the respondent, David Bush.

4 Ms. Lloyd has no memory of the events related to the accident. She suffered permanent head injuries and several lower extremity musculo-skeletal fractures. She was taken to the Kingston General Hospital and was later moved to a rehabilitation hospital from which she was discharged on July 30, 2003.

bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

...

The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

25 There is a strong presumption in favour of the impartiality of a trier of fact: see for example *Chippewas*, at para. 243, *Kelly v. Palazzo* (2008), 89 O.R. (3d) 111 (C.A.) at para. 20, leave to appeal refused, [2008] S.C.C.A. No. 152; *Peart v. Peel Regional Police Services Board* (2006), 217 O.A.C. 269 (C.A.), at para. 39, leave to appeal refused, [2007] S.C.C.A. No. 10; *R. v. A.G.* (1998), 114 O.A.C. 336 (C.A.), at para. 42, aff'd [2000] 1 S.C.R. 439; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at paras. 32 and 114.

26 Determining whether a reasonable apprehension of bias arises requires a highly fact-specific inquiry. According to *Chippewas*, at paras. 230:

The test is an objective one. Thus, the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial.

27 In *Chippewas*, the court warned at para. 243 that "[i]solated expressions of impatience or annoyance by a judge as a result of frustrations ... do not of themselves create unfairness."

28 I now turn to the two incidents in issue.

(i) The "Fraud" Allegation

29 To appreciate how this issue arose, it is necessary to review the record in some detail. I start with the evidence of David Bender, a professional engineer called by counsel for the appellants. He was qualified by the court to give expert evidence relating to practices and procedures of winter maintenance for municipal roads in Ontario.

30 It was Mr. Bender's opinion that the three-to-one sand/salt mixture applied to the road surface on January 3 did not have sufficient salt. He would have applied salt alone to the road before the snowstorm started. He had reviewed the Town records concerning the ploughing, salting and sanding operation including the notes of the two snow plough operators. He was asked in examination in chief if he had verified the accuracy of the Town's records. He responded: "No, I'm accepting it the way it is. I have nothing to verify it with. That's the limit of information I had to look at." He further testified as follows:

A. That was basically the analysis of the documents. I looked at what was being done with what was evident as far as the roadway was concerned and

TAB M

Case Name:
Mignacca v. Merck Frosst Canada Ltd.

Between
Benny Mignacca and Elaine Mignacca, Plaintiffs (Respondents),
and
Merck Frosst Canada Ltd., Merck Frosst Canada & Co. and Merck
& Co., Inc., Defendants (Moving Parties)

[2009] O.J. No. 1883

2009 ONCA 393

249 O.A.C. 19

96 O.R. (3d) 164

Docket: M37488

Ontario Court of Appeal
Toronto, Ontario

P.S. Rouleau J.A. (In Chambers)

Heard: May 5, 2009
Judgment: May 11, 2009.

(29 paras.)

Civil litigation -- Civil procedure -- Appeals -- Appeal as of right -- Leave to appeal -- Interlocutory or final orders -- Parties -- Class or representative actions -- Procedure -- Certification -- Motion by defendants for extension of time to file a motion for leave to appeal a 2008 order refusing leave to appeal an order certifying the present action as a class proceeding -- After leave to appeal was dismissed, Saskatchewan Court of Appeal quashed order certifying related Saskatchewan action -- Motion allowed -- Defendants to decide whether order refusing leave was interlocutory or final -- Delay had been adequately explained -- It may well be that motion judge would have viewed the matter differently had the decision of the Saskatchewan Court of Appeal been issued prior to her decision.

Motion by the defendants for an extension of time to file a motion for leave to appeal a 2008 order refusing leave to appeal an order certifying the present action as a class proceeding. The defendants were sued in several class actions as a result of the prescription drug Vioxx being withdrawn from the market. After the decision refusing leave to appeal in the present action was made, the Saskatchewan Court of Appeal quashed the order certifying the Saskatchewan action. The defendants argued that, as a result of the Saskatchewan Court of Appeal's decision, they faced conflicting decisions as to whether a class action involving Vioxx users was a certifiable proceeding that should be allowed to proceed.

HELD: Motion allowed. The defendants were to decide whether the refusal to grant leave was an interlocutory or final order. They had adequately explained both the delay and the reason why they only developed the intention to appeal after the appeal period had expired. Once the Saskatchewan Court of Appeal rendered its decision, the moving parties promptly brought the present motion. There was little prejudice flowing from the delay. It may well be that the motion judge would have viewed the matter differently had the decision of the Saskatchewan Court of Appeal been issued prior to her rendering her decision. If the defendants considered that the order was final, then the appeal was to this court as of right. If they considered the order to be interlocutory, then the appeal lay to the Divisional Court with leave.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 30(2)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 19(1)(b)

Rules of Civil Procedure, Rule 62.02(4)(a)

Appeal from:

On a motion for an extension of time to file a notice of motion for leave to appeal from the order of Justice Denise E. Bellamy of the Superior Court of Justice, dated November 24, 2008 and reported at 2008 CanLII 61238 (ON S.C.), refusing leave to appeal from the order of Justice Maurice Cullity of the Superior Court of Justice, dated July 28, 2008 and reported at (2008), 295 D.L.R. (4th) 32 (Ont. S.C.).

Counsel:

Neil Finkelstein, Catherine Beagan-Flood and Karin McCaig, for the moving parties.

Bonnie A. Tough and Jennifer Lynch, for the respondents.

The following judgment was delivered by

1 P.S. ROULEAU J.A.:-- The moving parties are seeking an extension of time in which they may seek leave to appeal the order of Bellamy J., pursuant to s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (the "CJA"), and rule 61.03.1 of the Rules of Civil Procedure. That order de-

17 Third, the respondents maintain that the extension of time ought not to be granted because the Saskatchewan Court of Appeal's decision has little or no bearing on Bellamy J.'s decision. Although the Saskatchewan and Ontario class actions involve the same product they are, in the respondents' view, framed differently. It is the way that the Saskatchewan action was pleaded that led to the certification order being quashed by the Court of Appeal. In the respondents' view, therefore, nothing has changed as a result of the Saskatchewan Court of Appeal's decision and the moving parties' proposed appeal has no merit.

18 Dealing with the respondents' third point, it must be kept in mind that the merits that I need to consider in this matter are the merits of the appeal from Bellamy J.'s decision on the leave to appeal motion. A significant factor on a leave to appeal motion is, as provided in rule 62.02(4)(a), whether "there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal." The reasons of both Cullity J. and Bellamy J. refer to the similarity between the Saskatchewan and Ontario actions. It may well be that, as submitted by the moving parties, Bellamy J. would have viewed the matter differently had the decision of the Saskatchewan Court of Appeal quashing the certification order issued prior to her rendering her decision. I am not, therefore, prepared to say that the proposed appeal is without merit.

19 The more difficult issue is the question of procedure. There is considerable confusion as to whether a refusal to grant leave to appeal can be appealed and, if so, what court to apply to and what procedure to follow.

20 There are two major steps in resolving this issue. The first step is for the moving party to decide whether the refusal to grant leave was an interlocutory or final order. Only then can the proper court and procedure be determined. Once in the proper forum, the moving party must then show that the case fits within the exception to the general rule that a refusal to grant leave to appeal cannot be appealed: see *Hillmond, Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (C.A.), and *Lombard Canada Co. v. Axa Assurance Inc.* (2007), 228 O.A.C. 32 (C.A.).

21 Many refusals of leave to appeal motions are clearly interlocutory. For example a refusal of a leave motion brought pursuant to s. 19(1)(b) of the CJA is clearly interlocutory as it seeks to review an order that itself was interlocutory. In such a case, the appropriate route is to seek leave to appeal from the refusal to the Divisional Court, again pursuant to s. 19(1)(b) of the CJA: see *Kohar v. Dufferin-Peel Catholic District School Board*, [1999] O.J. No. 3644 (Div. Ct.).

22 However, not every refusal of leave to appeal to the Divisional Court is necessarily an interlocutory order. Where, as in this case, a statute provides a right of appeal to the Divisional Court with leave of the Superior Court of Justice, the question of whether the refusal to grant leave is an interlocutory or final order will depend on whether the refusal meets the definition of a final order articulated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675. For example, this court in *Denison Mines* found that the refusal to grant leave to appeal pursuant to s. 45 of the *Arbitration Act*, 1991, S.O. 1991, c. 17, was a final order.

23 When considering the appropriate appeal route in this case, it must be recalled that Bellamy J. was sitting as a Superior Court judge and not as a single judge of the Divisional Court: see s. 30(2) of the CPA and rule 62.02(1.1). The rules governing the procedure for appeal are, therefore, the rules that generally apply to an appeal from an order of a Superior Court judge. Where the order is final, the appeal is to the Court of Appeal pursuant to s. 6(1)(b) of the CJA and no leave is re-

quired. Where the order is interlocutory, the appeal is governed by s. 19(1)(b) of the CJA and goes to the Divisional Court with leave.

24 Applying these principles to the present case, there is no scenario pursuant to which leave to appeal to this court would be required. Therefore, I see no basis for granting an extension of time for filing a notice of motion for leave to appeal to this court. If the moving parties consider that Bellamy J.'s order is final, then the appeal, if any, is to this court as of right. If they consider the order to be interlocutory, then the appeal, if any, lies to the Divisional Court with leave.

25 The respondents have argued that I should find that the appeal is without merit because Bellamy J.'s order is interlocutory. In the circumstances, I consider that this issue should properly be decided by a panel of this court, should the moving parties choose to pursue the appeal by way of s. 6(1)(b) of the CJA.

26 The question of whether this case falls within an exception to the general rule that a refusal of leave to appeal cannot be appealed will be resolved by the court to which the appeal is taken. Deciding the appropriate principles and then applying these principles to the case are matters properly addressed at the hearing of the appeal or on a motion to quash. Different considerations may well apply depending on the nature of the case and whether the order is final or interlocutory.

Conclusion

27 Should the moving parties conclude that the order is final and that their appeal lies to this court, I grant an extension of the time for filing the notice of appeal to May 21, 2009. If this appeal route is taken by the moving parties, the respondents are at liberty to bring a motion seeking to quash the appeal should they be of the view that Bellamy J.'s order is not a final order. As well, they are free to take the position, on appeal or in a motion to quash, that the order of Bellamy J. is not appealable pursuant to the principles outlined in *Hillmond* and *Denison Mines*. I should not, therefore, be taken to have decided these issues. If they are raised, they will be dealt with by a panel of this court.

28 If the moving parties decide to proceed in the Divisional Court on the basis that the order is interlocutory, they will have to bring the appropriate proceedings in that court.

29 In the circumstances, I make no award as to costs.

P.S. ROULEAU J.A.

cp/e/qlccl/qlpxm/qlaxw/qlaxr/qlhcs

TAB N

CONSTITUTIONAL LAW OF CANADA

Fifth Edition Supplemented

Volume 2

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47.1 Distribution of powers over legal rights

This chapter deals with s. 7 of the Charter of Rights, which is the first of eight sections (ss. 7 to 14) of the Charter that are grouped under the heading “Legal Rights”. The term legal rights does not have a precise legal or popular meaning. It certainly includes the rights of persons within the system of criminal justice, limiting the powers of the state with respect to investigation, search, seizure, arrest, detention, trial and punishment. However, as we shall see, s. 7 in particular spills over into civil justice as well.

The distribution of powers between the federal Parliament and the provincial Legislatures over the matters loosely encompassed by the vague term “legal rights” depends upon the characterization of each law. In characterizing a law, the law’s impact on civil liberties is generally irrelevant, or at least of only subordinate importance. If the law is in relation to criminal law or criminal procedure, it will be within federal power under s. 91 (27) of the Constitution Act, 1867. The various stages of a criminal trial from arrest and charge through to acquittal or conviction and sentence are accordingly within federal legislative authority. On the other hand, provincial authority over the administration of justice in the province (s. 92(14)) includes the constitution of criminal and civil courts and civil procedure, and extends to some aspects of the investigation and prosecution of crime.¹ If a law establishes a legislative scheme, for example, for the raising of taxes, securities regulation or traffic regulation, the law may provide for investigation and enforcement of the scheme. The validity of these adjectival provisions depends upon the validity of the scheme to which they are incidental. There is no suggestion in the cases that the severity of the law’s impact on civil liberties is of importance in assigning legislative jurisdiction.²

47.2 Section 7 of Charter

Section 7 of the Charter of Rights³ provides as follows:

- ¹ See chs. 7, Courts, and 19, Criminal Justice, above.
- ² On the distribution of legislative power over legal civil liberties, see Tarnopolsky, *The Canadian Bill of Rights* (2nd ed., 1975), 55-56.
- ³ For commentary on s. 7, see Stewart, *Fundamental Justice* (2012); Paciocco, *Charter Principles and Proof in Criminal Cases* (1987); Beaudoin and Mendes (eds.), *The Canadian Charter of Rights and Freedoms* (4th ed., 2005), ch. 10 (by P. Garant); Finkelstein and Finkelstein, *Constitutional Rights in the Investigative Process* (1991), chs. 2, 3; Stuart, *Charter Justice in Canadian Criminal Law* (3rd ed., 2001), ch. 2; McLeod, Takach, Morton, Segal, *The Canadian Charter of Rights* (Carswell, loose-leaf) ch. 5; *Canadian Charter of Rights Annotated* (Canada Law Book, loose-leaf), annotation to s. 7; the last work provides a bibliography of the relevant literature.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 protects the right of “everyone” to “life, liberty and security of the person”, and imposes the requirement that any deprivation be “in accordance with the principles of fundamental justice”.

It is arguable that s. 7 confers two rights: (1) a right to “life, liberty and security of the person” that is unqualified, except by s. 1 (the limitation clause) of the Charter; and (2) a right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. If this were correct, then every deprivation of life, liberty or security of the person would be a breach of s. 7, even if the principles of fundamental justice had been complied with. This two-rights interpretation of s. 7, although supported by the grammatical structure of the English (but not the French) version of the section,⁴ is otherwise an unnatural reading of the section, and one that would give s. 7 an extraordinarily broad sweep. The better view is that s. 7 confers only one right, namely, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. The cases generally assume that the single-right interpretation is the correct one, so that there is no breach of s. 7 unless there has been a failure to comply with the principles of fundamental justice.⁵

The Canadian Bill of Rights, by s. 1(a) guarantees:

the right of the individual to life, liberty and security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law. . . .

In addition, s. 2(e) provides that no law of Canada is to be construed or applied so as to:

deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. . . .

Section 7 of the Charter can be seen as an amalgam of these two provisions, but s. 7 is significantly narrower in scope than either s. 1(a), which extends to “enjoyment of property”, or s. 2(e), which extends to any determination of “rights and obligations”. Section 7’s protection is limited to “life, liberty and security of

4 Contrast the grammatical structure of the fifth and fourteenth amendments of the Constitution of the United States, which clearly confer only one right, namely, the right not to be deprived of life, liberty or property without due process of law.

5 E.g., *Can. v. Chiarelli* [1992] 1 S.C.R. 711 (denial of liberty in compliance with fundamental justice is not a breach of s. 7). However, in *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, Lamer C.J. (at 500) expressly left the issue open, and Wilson J. (at 523) seemed to accept the two-right interpretation, because she said that even if fundamental justice were satisfied s. 1 would *also* have to be satisfied. Both positions are puzzling: Lamer J.’s elaborate discussion of fundamental justice would have little point if *any* denial of life, liberty or security of the person was a breach of s. 7; and Wilson J. had previously doubted the two-right interpretation in *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441, 487. The two-right interpretation was espoused by Arbour J. in dissent in *Gosselin v. Que.* [2002] 4 S.C.R. 429, paras. 338-343; L’Heureux-Dubé J., also dissenting, agreed with her, but the other seven judges did not.

the person", a phrase which does not include property and which does not include a determination of rights and obligations respecting economic interests. As has earlier been explained, the Canadian Bill of Rights (which applies only to federal laws) remains in force, and ss. 1(a) and 2(e) are of continuing importance because their coverage is broader than s. 7.⁶

The Constitution of the United States, by the fifth amendment, which applies to the federal government, provides that no person "shall be deprived of life, liberty, or property, without due process of law". The fourteenth amendment, which applies to the states, also guarantees against the deprivation of "life, liberty, or property, without due process of law." These guarantees are also broader than s. 7, because they extend to "property", although they make no reference to "security of the person". Another difference is that the American guarantees refer to "due process of law" whereas s. 7 refers to "the principles of fundamental justice". The significance of this change is examined in the later discussion of fundamental justice.⁷

47.3 Application of s. 1

Section 7 makes clear that a law can deprive a person of life, liberty or security of the person if the law conforms to the principles of fundamental justice.⁸ Could a law that did not conform to the principles of fundamental justice be upheld under s. 1? Could a violation of fundamental justice ever be a reasonable limit that can be demonstrably justified in a free and democratic society? In the Supreme Court of Canada, Wilson J. several times expressed the view that the answer to this question is no: a violation of fundamental justice could never be justified under s. 1. However, for the most part, the Court has routinely moved on to the issue of s. 1 justification before finding a breach of s. 7, and some judges (although never a majority) have held that a particular breach of s. 7 was justified under s. 1. The issue is examined in chapter 38, Limitation of Rights, above.⁹

6 Chapter 35, Canadian Bill of Rights, under heading, 35.4, "Contents", above.

7 Section 47.10, "Fundamental justice", below.

8 Note, however, that the two-right interpretation of s. 7 calls for s. 1 justification even if the principles of fundamental justice are satisfied: text accompanying note 4, above.

9 Chapter 38, Limitation of Rights, under heading 38.14, "Application to qualified rights", above.

47.4 Benefit of s. 7

(a) Corporations

Section 7 is applicable to “everyone”, a word that is normally apt to include a corporation as well as an individual.¹⁰ However, the Supreme Court of Canada has held that in the context of s. 7 “everyone” does not include a corporation. An artificial person such as a corporation is incapable of possessing “life, liberty or security of the person”, because these are attributes of natural persons.¹¹ Therefore, s. 7 does not apply to a corporation.

This does not mean that a corporation can never invoke s. 7.¹² When a corporation is a defendant to a prosecution, the corporation is entitled to defend the charge on the basis that the law is a nullity. In *R. v. Wholesale Travel Group* (1991),¹³ the Supreme Court of Canada held that this principle allows a corporation to defend a criminal charge on the ground that the law under which the charge was laid would be a violation of s. 7 in its application to an individual. The Court rejected the argument that a law could be unconstitutional for individuals, but constitutional for corporations. The Court also rejected the argument that a corporation could be convicted under an unconstitutional law, even though the defect in the law (a denial of “liberty” in breach of fundamental justice) was not one that was relevant to a corporation (because a corporation has no right to “liberty”).¹⁴

(b) Immigrants

“Everyone” in s. 7 includes illegal immigrants to Canada. In *Singh v. Minister of Employment and Immigration* (1985),¹⁵ Wilson J. said that s. 7 rights could be asserted by “every human being who is physically present in Canada and by virtue of such presence amenable to Canadian law”.¹⁶ What that meant, she held, was that any illegal immigrant who claimed to be a refugee was entitled to a hearing before an official or tribunal with authority to determine the issue. The argument that such a procedure would make it impossible to deal expeditiously with the many thousands of refugee claimants who arrive in Canada each year was rejected as an inadmissible “utilitarian” or “administrative” concern, which could not be

¹⁰ Chapter 37, Application of Charter, under heading 37.1, “Benefit of rights”, above.

¹¹ *Irwin Toy v. Que.* [1989] 1 S.C.R. 927, 1004; *Dywidag Systems v. Zutphen Bros.* [1990] 1 S.C.R. 705, 709.

¹² An individual may invoke s. 7, even when appearing as a witness as a representative of a corporation: *Thomson Newspapers v. Can.* [1990] 1 S.C.R. 425.

¹³ [1991] 3 S.C.R. 154.

¹⁴ See also ch. 59, Procedure, under heading 59.2, “Standing”, below.

¹⁵ [1985] 1 S.C.R. 177.

¹⁶ *Id.*, 202 per Wilson J. for half of the six-judge bench. Beetz J. for the other half decided the case on the basis of the Canadian Bill of Rights rather than the Charter, but he assumed that illegal immigrants were entitled to the rights under the Canadian Bill of Rights.

permitted to vitiate individual rights.¹⁷ In fact, after *Singh*, refugee claimants arrived in Canada at the rate of about 36,000 a year, and the federal government was not able to comply with the *Singh* rule in a timely fashion. As a result, a huge backlog of refugee claimants developed, and they endured delays of two or more years awaiting adjudication.¹⁸

(c) Foetus

“Everyone” in s. 7 does not include a foetus, and so a foetus is not entitled to a right to life.¹⁹ The Supreme Court of Canada has in fact used s. 7 to strike down *restrictions* on abortion, the reasoning being that the restrictions deprived the mother of her right to liberty or security of the person.²⁰

47.5 Burden of s. 7

Section 7, like all the other Charter rights, applies only to “governmental action”, as defined in s. 32 of the Charter. This is the subject of chapter 37, Application of Charter, above.²¹

47.6 Life

Section 7 protects “life, liberty and security of the person”. So far as “life” is concerned, the section has little work to do, because governmental action rarely causes death. The most obvious case is the death penalty, but this was removed from Canada’s Criminal Code in 1976—before the adoption of the Charter of

¹⁷ *Id.*, 218-219.

¹⁸ See, for example, the reports of refugee backlogs in *The Globe and Mail* newspaper, February 23, 26 and 27, 1991. At that time, the refugee-determination procedures occupied a 276-member Immigration and Refugee Board and 773 civil servants. Despite these resources, in 2003, the Immigration and Refugee Board had a backlog of more than 50,000 cases: *Globe and Mail* newspaper, November 22, 2003, p. A23. Mr Singh himself, the litigant in *Singh*, has fully availed himself of his constitutional rights. In 2005, 20 years after the Supreme Court ruling, he was still in Canada fighting his deportation to India: *Globe and Mail* newspaper, January 18, 2005, p. A17.

¹⁹ Chapter 37, Application of Charter, under heading 37.1(b), “Everyone, anyone, any person”, above.

²⁰ *R. v. Morgentaler* (No. 2) [1988] 1 S.C.R. 30.

²¹ On the extent to which s. 7 could be infringed by the action of a foreign government, an issue that arises in extradition cases, among others, see ch. 37, Application of Charter, under heading 37.2(i), “Extraterritorial application”, above.

Rights.²² The Supreme Court of Canada has held, however, that excessive waiting times for treatment in the public health care system of Quebec increased the risk of death, and were a violation of the right to life (as well as security of the person).²³

Abortion is sometimes characterized as implicating a “right to life”, meaning a right possessed by a foetus. That characterization does not work in this context. The s. 7 right is possessed by “everyone”, and everyone does not include a foetus.²⁴ The Supreme Court of Canada has used s. 7 to strike down *restrictions* on abortion, reasoning that they infringed the liberty and security of the person of the mother, and did not comply with the principles of fundamental justice.²⁵

47.7 Liberty

(a) Physical liberty

Section 7 protects “life, liberty and security of the person”. What is included in “liberty”?

“Liberty” certainly includes freedom from physical restraint. Any law that imposes the penalty of imprisonment, whether the sentence is mandatory²⁶ or discretionary,²⁷ is by virtue of that penalty a deprivation of liberty, and must conform to the principles of fundamental justice. A law that imposes only the penalty of a fine is not a deprivation of liberty, and need not conform to the principles of fundamental justice.²⁸ Nor is the suspension of a driver’s licence a

22 A few death penalty provisions remained outside the Criminal Code (for espionage, mutiny with violence and war crimes). These were never challenged, no doubt because they were never exercised, and they were repealed in 1998. See ch. 53, Cruel and Unusual Punishment, under heading 53.7, “Death penalty”, below.

23 *Chaoulli v. Que.* [2005] 1 S.C.R. 791. The Court was unanimous on this ruling. The Court held by a majority of four to three that a ban on private health insurance was invalid for breach of Quebec’s Charter of Human Rights and Freedoms. The Court split three-three (one judge not deciding) on whether the law was a breach of fundamental justice contrary to s. 7 of the Charter of Rights.

24 Section 47.4(c), “Foetus”, above.

25 *Ibid.*

26 *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 515, 529 (mandatory term of imprisonment a denial of liberty); *R. v. Swain* [1991] 1 S.C.R. 933 (automatic detention of person acquitted on ground of insanity a denial of liberty.)

27 *Re ss. 193 and 195.1 of Criminal Code* (Prostitution Reference) [1990] 1 S.C.R. 1123, 1140, 1215 (“possibility of imprisonment” a denial of liberty); *R. v. Malmo-Levine* [2003] 3 S.C.R. 571, para. 84 (“availability of imprisonment . . . is sufficient to trigger s. 7 scrutiny”).

28 *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 529, but note that Lamer J. (at 515) left open the question of “imprisonment as an alternative to the non-payment of a fine”, and (at 516) left open the question whether there could be a breach of s. 7 even if imprisonment was not available as a sentence. These reservations by Lamer J. raise the possibility of a huge scope for “liberty” in s. 7, since even civil orders are ultimately enforceable by imprisonment (for contempt).

deprivation of liberty.²⁹ As well as imprisonment, statutory duties to submit to fingerprinting,³⁰ to produce documents,³¹ to give oral testimony³² and not to loiter in or near schoolgrounds, playgrounds, public parks and bathing areas,³³ are also deprivations of liberty attracting the rules of fundamental justice. On the other hand, the deportation of a non-citizen is not a deprivation of liberty, attracting the rules of fundamental justice, because a non-citizen has no right to enter or remain in Canada.^{33a}

Once a criminal defendant has been convicted and sentenced to a term of imprisonment, will a change in the terms of the sentence amount to a deprivation of liberty? In *Cunningham v. Canada* (1993),³⁴ the defendant had been sentenced in 1981 to 12 years' imprisonment for manslaughter. Under the Parole Act in force at the time of his sentencing, he was entitled to be released on mandatory supervision after serving two-thirds of the sentence, provided he had been of good behaviour. Before he reached the two-thirds point of his sentence (which was 1989), the Parole Act was amended (in 1986) to empower the National Parole Board to cancel the conditional release and require the continued detention of the prisoner for the rest of his sentence. This power was exercisable where there was reason to believe that the inmate, if released, was likely to commit an offence causing death or serious harm during the unexpired portion of his sentence. The Board exercised its new power in this case, and the defendant was accordingly not released on mandatory supervision in 1989. He applied for habeas corpus. The Supreme Court of Canada held that, although the amendment of the Parole Act had not had the effect of lengthening the defendant's 12-year sentence, it had altered the manner in which the sentence was to be served. Serving time on mandatory supervision was a lesser deprivation of liberty than serving time in prison. This change in the law should be treated as the deprivation of a liberty interest, making s. 7 of the Charter potentially applicable. The Court went on to hold that the change in the law was not a breach of the principles of fundamental justice,³⁵ so that the defendant remained in prison.

29 *Buhlers v. B.C.* (1999) 170 D.L.R. (4th) 344 (B.C.C.A.).

30 *R. v. Beare* [1988] 2 S.C.R. 387.

31 *Thomson Newspapers v. Can.* [1990] 1 S.C.R. 425.

32 *Ibid.*; *Stelco v. Can.* [1990] 1 S.C.R. 617.

33 *R. v. Heywood* [1994] 3 S.C.R. 761.

33a *Medovarski v. Can.* [2005] 2 S.C.R. 539, para. 46 (deportation upheld); distinguished in *Charkaoui v. Can.* [2007] 1 S.C.R. 350, para. 16 (when combined with detention as part of the "security certificate" process, deportation is a deprivation of liberty: para. 17). Deportation to torture is a deprivation of liberty: *Id.*, para. 17; *Suresh v. Can.* [2002] 1 S.C.R. 3, para. 44 (and "barring extraordinary circumstance" will also be a breach of fundamental justice: para. 76). Deportation is also a deprivation of liberty if the non-citizen has made a refugee claim that has not been rejected in a fair hearing: *Singh v. Minr. of Emplmt. and Imm.* [1985] 1 S.C.R. 177.

34 [1993] 2 S.C.R. 143. The opinion of the Court was written by McLachlin J.

35 This part of the decision is discussed at note 90, below.

In *May v. Ferndale Institution* (2005),³⁶ the Court was asked to review a decision by the Correctional Service of Canada to transfer a prisoner in the federal penitentiary system from a minimum-security institution to a medium-security institution. The medium-security institution would be more restrictive of the prisoner's liberty than the minimum-security institution. Therefore, the Court held, following *Cunningham*, the decision to transfer the prisoner was a deprivation of his "residual liberty". Section 7 applied and the decision had to observe the principles of fundamental justice. In this case, the Court held that the failure of the Correctional Service to fulfil a statutory obligation to provide information

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36 [2005] 3 S.C.R. 809. LeBel and Fish JJ. wrote the opinion of the majority. Charron J. wrote a dissenting opinion, disagreeing only with the majority's ruling that the decision was unlawful.

as to the reasons for the transfer was not sufficiently important to amount to a breach of fundamental justice.³⁷ (It did make the transfer unlawful, however, and the Court ordered that the prisoner be returned to a minimum-security institution.)

The Supreme Court of Canada has often been urged to extend liberty beyond freedom from physical restraint, and has been reluctant to set off down a slippery slope that would vastly extend the scope of s. 7.³⁸ However, in *Blencoe v. British Columbia* (2000),³⁹ Bastarache J., speaking for a majority of five judges of the Supreme Court of Canada, asserted that liberty in s. 7 is “no longer restricted to mere freedom from physical restraint”; it applies whenever the law prevents a person from making “fundamental personal choices”.⁴⁰ The case involved a claim by Mr Blencoe that his liberty interest had been impaired because of the unreasonable delay of the British Columbia Human Rights Commission in disposing of complaints of sexual harassment made against him by two women. It is very difficult to see how a plausible deprivation of liberty can be constructed out of these facts, and Bastarache J. with little discussion held that “in the circumstances of this case, the state has not prevented [Mr Blencoe] from making any fundamental personal choices”.⁴¹ Mr Blencoe was therefore denied a remedy. LeBel J. for the dissenting minority of four (who would have ordered an expedited hearing on administrative-law principles) pointedly refused to comment on the scope of s. 7 of the Charter.⁴² With respect, LeBel J.’s caution seems the more

37 *Id.*, paras. 89-92, ruling that the *Stinchcombe* rules of disclosure (described in sec. 47.21(c), “Pre-trial disclosure by the Crown”, below) did not apply outside criminal proceedings where the innocence of the accused was at stake.

38 A notable exception was Wilson J., who consistently advocated a broad definition of liberty: *Shigh v. Minr. of Empl. and Imm.* [1985] 1 S.C.R. 177, 205; *Operation Dismantle v. The Queen* [1985] 1 S.C.R. 441, 488; *R. v. Jones* [1986] 2 S.C.R. 284, 318-319; *R. v. Morgentaler (No. 2)* [1988] 1 S.C.R. 30, 164-166. Wilson J.’s definition has been receiving increasing support, but has not yet attracted a majority of the Supreme Court of Canada: *B.(R.) v. Children’s Aid Society* [1995] 1 S.C.R. 315, para. 80 per La Forest J. with the concurrence of L’Heureux-Dubé, Gonthier and McLachlin JJ. (liberty includes right to choose medical treatment of one’s children); *R. v. O’Connor* [1995] 4 S.C.R. 411, para. 111 per L’Heureux-Dubé J. with the concurrence of La Forest, Gonthier and McLachlin JJ. (liberty includes privacy; the other five judges acknowledged that privacy was a constitutional right but were silent as to its source); *Godbout v. Longueuil* [1997] 3 S.C.R. 844, para. 66 per La Forest J. with the concurrence of L’Heureux-Dubé and McLachlin JJ. (liberty includes right to choose place of residence); *New Brunswick v. G.(J.)* [1999] 3 S.C.R. 46, paras. 117-118 per L’Heureux-Dubé J. with the concurrence of McLachlin J. (liberty includes right to bring up children).

39 [2000] 2 S.C.R. 307.

40 *Id.*, paras. 49, 54.

41 *Id.*, para. 54. The Court also rejected the claim that Blencoe’s security of the person was impaired: see section 47.8, “Security of the person”, below.

42 *Id.*, para. 187; LeBel J. went on to say (para. 189) that it was unwise for the evolution of the common law and civil law to assume that the Charter “must solve every legal problem”.

appropriate position to take in a case that did not call for a ruling about the protection of such vague notions as fundamental personal choices.⁴³

(b) Economic liberty

There are good reasons for caution in expanding the concept of liberty in s. 7. One reason is the unhappy experience of the United States during the *Lochner* era. Between 1905, when *Lochner v. New York*⁴⁴ was decided, and 1937, when the case was overruled, the Supreme Court of the United States protected the liberties of the owners of factories and mines against the efforts of Congress and the state Legislatures to limit hours of work, to require the payment of minimum wages, to impose health and safety standards and to protect union activity. As Oliver Wendell Holmes pointed out in his brilliant dissenting opinions, the Court used the Constitution to enforce a laissez-faire economic theory that had been rejected by the elected legislators. The Court had taken sides in a political conflict that was suitable for resolution only by elected legislators. In 1937, after an exasperated President Roosevelt had proposed his court-packing plan, the Court changed its mind and reversed these decisions. Since then, the Court has been extremely reluctant to review social and economic regulation, despite its inevitable interferences with the property and contract rights that the Constitution of the United States expressly guarantees.⁴⁵

All this happened in the United States, but the *Lochner* era cast its shadow over Canada as well. The framers of Canada's Charter of Rights deliberately omitted any reference to property in s. 7, and they also omitted any guarantee of the obligation of contracts. These departures from the American model, as well as the replacement of "due process" with "fundamental justice" (of which more will be said later), were intended to banish *Lochner* from Canada.⁴⁶ The product is a s. 7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including economic liberty.⁴⁷

43 In *R. v. Marmo-Levine* [2003] 3 S.C.R. 571, paras. 85-87, the majority of the Supreme Court of Canada seemed to accept, obiter, that s. 7 protected fundamental personal choices, but they did not accept that the recreational use of marihuana qualified as a fundamental personal choice.

44 (1905) 198 U.S. 45 (maximum hours of work law struck down over eloquent dissent of Holmes J.).

45 The story is told in L.H. Tribe, *American Constitutional Law* (Foundation Press, New York, 3rd ed., 2000), ch. 8; J.E. Nowak and R.D. Rotunda, *Constitutional Law* (West, St. Paul, Minn., 7th ed., 2004), ch. 11.

46 The legislative history is reviewed by Lamer J. in *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486, 504-505.

47 *Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference)* [1990] 1 S.C.R. 1123, 1163-1166 per Lamer J. But see the surprising decision in *Health Services and Support—Facilities Subsector Bargaining Assn. v. B.C.* [2007] 2 S.C.R. 391, holding that s. 2(d) of the Charter (freedom of association) protects collective bargaining by unions, and the protection extends to the terms of collective agreements. The Court decided that a provincial statute that attempted to legislate working conditions in the health care sector was invalid to the extent that it conflicted

Another reason for caution in the definition of liberty is the placement of s. 7 within the Charter of Rights. Section 7 leads off a group of sections (ss. 7 to 14) entitled "Legal Rights". These provisions are mainly addressed to the rights

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with the terms of a collective agreement. Freedom of contract prevailed over the statute. For criticism, see R.E. Charney, "The Contract Clause Comes to Canada: The British Columbia *Health Services* Case and the Sanctity of Collective Agreements" (2007) 23 Nat. J. Con. Law 65.

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of individuals in the criminal justice system: search, seizure, detention, arrest, trial, testimony and imprisonment are the concerns of ss. 8 to 14. It seems reasonable to conclude, as Lamer J. has done, that "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration".⁴⁸ This line of reasoning also excludes economic liberty from s. 7.

The Supreme Court of Canada has held that s. 7 does not apply to corporations, because "liberty" does not include corporate activity.⁴⁹ Nor does "liberty" include the right to do business, for example, by selling goods on a Sunday.⁵⁰ Does "liberty" include the right of an individual to work? Despite some lower court decisions⁵¹ to the contrary, which emphasize the role of work as an instrument of self-fulfilment, the regulation of trades and professions should be regarded as restrictions on economic liberty that are outside the scope of s. 7.⁵²

(c) Political liberty

"Liberty" does not include freedom of conscience and religion, freedom of expression, freedom of assembly, freedom of association, the right to vote and be a candidate for election, or the right to travel. These rights are all guaranteed elsewhere in the Charter of Rights, and should be excluded from s. 7.⁵³

48 *Id.*, 1173. Accord, *Gosselin v. Que.* [2002] 4 S.C.R. 429, paras. 77 per McLachlin C.J. for majority (but with suggestion that definition is capable of expansion), para. 216 per Bastarache J. dissenting but not on this point. In *Chaoulli v. Que.* [2005] 1 S.C.R. 791 (prohibition on private health insurance struck down), McLachlin C.J. and Major J., who (with Bastarache J.) applied s. 7 to strike down the law as "arbitrary", seem to have surreptitiously abandoned the link with the administration of justice, and Binnie and LeBel JJ., who (with Fish J.) wrote the dissenting opinion, explicitly said (paras. 195-199) that the link was not essential. Deschamps J., whose concurring opinion made up a majority to strike down the law, did not do so under s. 7 and did not discuss this point.

49 Note 11, above.

50 *R. v. Edwards Books and Art* [1986] 2 S.C.R. 713, 786 (s. 7 does not confer "an unconstrained right to transact business whenever one wishes"); *Siemens v. Man.* [2003] 1 S.C.R. 6, para. 46 (no right to operate video lottery terminals).

51 E.g. *Wilson v. Medical Services Commn.* (1988) 53 D.L.R. (4th) 171 (B.C.C.A.) (s. 7 violated by restrictions on the practice of medicine); criticized by M.D. Lepofsky, "Comment" (1989) 68 Can. Bar Rev. 615.

52 *Re ss. 193 and 195.1 of Criminal Code (Prostitution Reference)* [1990] 1 S.C.R. 1123, 1170-1171 per Lamer J. (disapproving *Wilson*, previous note); *ILWU v. Can.* [1994] 1 S.C.R. 150 (holding that back-to-work legislation does not violate the liberty of the employees). But see *Ruffo v. Conseil de la Magistrature* [1995] 4 S.C.R. 267, para. 38, where Gonthier J., for the majority of the Court, asserted without discussion that s. 7 demanded that a provincial court judge's conduct be examined by "an independent and impartial tribunal". The disciplinary committee charged with investigating the matter had the power to recommend the judge's dismissal. The case could have been decided under s. 23 of Quebec's Charter of Human Rights and Freedoms, which guaranteed an independent and impartial tribunal for a "determination of ... rights and obligations" and without reference to life, liberty or security of the person. In any case, no remedy was granted, because the Court rejected the allegation that the committee was biased.

53 *Ibid.* But see *B.(R.) v. Children's Aid Society* [1995] 1 S.C.R. 315, para. 83 per La Forest J. (with the concurrence of three others) (liberty includes the right of parents who were Jehovah's

judge.⁸⁰ Thus, the division of the Court was seven-two in favour of the narrower interpretation of s. 7.⁸¹

47.9 Property

Section 7 protects “life, liberty and security of the person”. The omission of property⁸² from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7.⁸³ The due process clauses in the fifth and fourteenth amendments of the Constitution of the United States protect “life, liberty or property”. And the due process clause in s. 1(a) of the Canadian Bill of Rights protects “life, liberty, security of the person and enjoyment of property”.

The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government.⁸⁴ It means that s. 7 affords no guarantee of fair treatment by courts,⁸⁵ tribunals or officials with power over the purely economic interests of individuals or corporations.⁸⁶ It also requires, as we have noticed in the earlier discussions of “liberty” and “security of the person”, that those terms

provided for would be unconstitutional as a denial of the right to security of the person (except in the unlikely event of their being justified under s. 1).

80 L'Heureux-Dubé J. agreed with Arbour J. on s. 7 (para. 141). Bastarache and LeBel JJ., who also dissented (based on s. 15), essentially agreed with McLachlin C.J.'s majority opinion on s. 7.

81 See also *Masse v. Ont.* (1996) 134 D.L.R. (4th) 20 (Ont. Div. Ct.), rejecting constitutional challenge to law reducing provincial social assistance rates.

82 The gap is not filled by s. 8's prohibition of unreasonable “seizure”. Section 8 applies only to a seizure of property for investigatory or evidentiary purposes: *Re Becker* (1983) 148 D.L.R. (3d) 539 (Alta. C.A.) (s. 8 does not apply to an expropriation of property).

83 However, the International Covenant on Civil and Political Rights, which in articles 6-11 includes elaborate provisions regarding life, liberty and security of the person, also omits any guarantee of property rights.

84 The courts will imply these rights in the absence of an express legislative provision to the contrary: see ch. 29, Public Property, under heading 29.5, “Expropriation”, above; but there is no constitutional impediment to an express legislative provision to the contrary, except for s. 1(a) of the Canadian Bill of Rights, which is applicable only to the federal Parliament.

85 Section 7 does not protect the right of action for damages: *Wittman v. Emmott* (1991) 77 D.L.R. (4th) 77 (B.C.C.A.); *Budge v. Alta.* (1991) 77 D.L.R. (4th) 361 (Alta. C.A.).

86 The courts will imply a duty to observe the rules of “natural justice” in the absence of an express legislative provision to the contrary, but there is no constitutional impediment to an express legislative provision to the contrary. Once again, an exception must be made for the federal jurisdiction, because s. 2(e) of the Canadian Bill of Rights requires compliance with “the principles of fundamental justice” for the determination of “rights and obligations”. Note also *Morguard Investments v. De Savoye* [1990] 3 S.C.R. 1077, 1110 (obiter suggestions by La Forest J. that s. 7, “though not made expressly applicable to property”, might play a role in conflict of laws cases in the courts).

be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.⁸⁷

The omission of property rights from s. 7 also ensures a continuing role for the Canadian Bill of Rights, which continues to apply to federal (but not provincial) laws.⁸⁸ In the Canadian Bill of Rights, "enjoyment of property" is guaranteed by the due process clause of s. 1(a); there is also, in s. 2(e), a guarantee of "a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations". Although s. 2(e) has been held to be only a guarantee of a fair procedure,⁸⁹ the reference to the determination of "rights and obligations" extends beyond s. 7's "life, liberty and security of the person". For example, in *Singh v. Minister of Employment and Immigration* (1985),⁹⁰ where the question was whether refugee claimants had been accorded a sufficient hearing under federal law, Beetz J., for half of the six-judge bench, being undecided whether life, liberty or security of the person was implicated, decided the case under s. 2(e) of the Canadian Bill of Rights. Wilson J., for the other half of the bench, held that s. 7 did apply, and she decided the case on that basis. Both judges were agreed in the result, which was that the Immigration Act's procedures did not measure up to the standard of fundamental justice, and were therefore inoperative or invalid.

MacBain v. Lederman (1985)⁹¹ is another example of the broad reach of s. 2(e). The issue in that case was whether the federal Human Rights Code violated fundamental justice in the provisions establishing an adjudicatory tribunal. The Code provided that the members of the tribunal were to be appointed by the Human Rights Commission. It was argued that this mode of appointment gave rise to a reasonable apprehension of bias because the Commission was also in effect the prosecutor of the complaint. The Federal Court of Appeal upheld the claim of bias, and struck down the appointment provisions of the Code. The Court relied upon s. 2(e), which was clearly applicable, because the tribunal had the power to make a determination of the respondent's rights and obligations. The Court did not rely upon s. 7, presumably because the tribunal had no power over life, liberty or security of the person.⁹² Civil litigation, whether before the courts or tribunals, is usually about money or property or other purely economic interests. Section 7 does not apply to this kind of litigation, but s. 2(e) does apply, so long as the dispute is governed by federal law.

In *Authorson v. Canada* (2003),⁹³ a disabled veteran challenged a provision in the federal Department of Veterans Affairs Act that barred any claim to interest

87 See *Irwin Toy v. Que.* [1989] 1 S.C.R. 927, 1003.

88 Chapter 35, Canadian Bill of Rights, above.

89 This is clear from the context; and see note 97 and accompanying text, below.

90 [1985] 1 S.C.R. 177.

91 [1985] 1 F.C. 856 (C.A.).

92 Compare *Blencoe v. B.C.* [2002] 2 S.C.R. 307, note 68, above.

93 [2003] 2 S.C.R. 40. Major J. wrote the opinion of the unanimous Court.

on moneys held by the Department on behalf of disabled veterans. The plaintiff was a disabled veteran who had been incapable of managing his own funds and for whom the Department had (in accordance with its normal practice) been collecting his veteran's pension payments. After the plaintiff became competent, the Department paid him the pension money that had accumulated over a 40-year period, but the Department paid him no interest on the money. The plaintiff sued for the interest. It was common ground that the Crown was under a fiduciary duty to the veterans for whom it was holding funds to pay interest on the funds. The problem for the plaintiff was the statute that unambiguously barred any claim by veterans to interest on the funds. Section 7 of the Charter was no help, since only property rights were at stake. The plaintiff accordingly invoked ss. 1(a) and 2(e) of the Canadian Bill of Rights. The Supreme Court of Canada denied relief under both provisions. With respect to s. 1(a), the plaintiff argued that he had been deprived of the "enjoyment of property" without "due process of law"; Parliament had taken away his rights without notice or hearing. But the Court refused to impose any additional procedural obligations on Parliament: "the only procedure due any citizen of Canada is that proposed legislation receive three readings in the Senate and House of Commons and that it receive Royal Assent".⁹⁴ Nor did s. 2(e) impose its right to a "fair hearing" on Parliament (as opposed to courts and administrative tribunals). The Court also refused to interpret s. 1(a) as imposing a substantive obligation to provide compensation for expropriated property.⁹⁵

47.10 Fundamental justice

(a) Procedure and substance

A deprivation of life, liberty or security of the person is a breach of s. 7 of the Charter only if the deprivation is not in accordance with "the principles of fundamental justice".⁹⁶

When the Charter was adopted in 1982, the phrase "the principles of fundamental justice" did not have a firmly established meaning in Anglo-Canadian law. The phrase did appear in s. 2(e) of the Canadian Bill of Rights, which guarantees to a person "the right to a fair hearing in accordance with the

94 *Id.*, para. 37, Folld. in *Taylor v. Can.* (2007) 286 D.L.R. (4th) 385 (F.C.A.), paras. 91-96 (Parliament under no duty to provide prior notice to persons potentially affected by statute containing loss of citizenship provisions).

95 The plaintiff pressed on, with the ingenious argument that the Supreme Court decision extinguishing his right to interest should not be interpreted as extinguishing his right to damages for breach of fiduciary duty, although an "interest" figure would have to be deducted from the damages. This argument was accepted by a superior court judge in Ontario, who awarded damages (minus an interest figure). However the damages award was reversed on appeal by the Court of Appeal, which held that the Supreme Court decision had extinguished all relief for the Crown's breach of fiduciary duty: *Authorson v. Can.* (2007) 86 O.R. (3d) 321 (C.A.), leave to appeal denied by the SCC on January 17, 2008.

96 This assumes that s. 7 confers only a single right: see note 5 and accompanying text, above.

because he had not been charged with an offence. Nor was it clear whether he would be a witness at the accused's trial; if he was not a witness, the s. 13 right against self-incrimination would not apply. The Court held that this was another case for the "residual protection" of s. 7.⁶⁹ While the confession would obviously be used in the trial of the accused, the person who made the confession would be entitled to the same rights as if he were covered by s. 13. That meant that in other proceedings the confession could not be used to incriminate him ("use immunity"), and evidence derived from the confession could not be used either ("derivative use immunity"). However, the person who made the confession was not entitled to immunity from prosecution for the crime to which he had confessed ("transactional immunity"). Of course, any such prosecution would have to be conducted on the basis of evidence obtained independently of the confession.

51.5 Presumption of innocence (s. 11(d))

(a) Section 11(d)

Section 11(d) of the Charter of Rights⁷⁰ provides as follows:

11. Any person charged with an offence has the right

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Section 11(d) is very similar to s. 2(f) of the Canadian Bill of Rights. There is no provision quite like s. 11(d) in the American Bill of Rights, although the due process clauses of the fifth and fourteenth amendments have been held to include a presumption of innocence⁷¹ and the sixth amendment gives to an accused the right to a "public" trial by an "impartial" jury.

The most important application of the presumption of innocence is that, in criminal cases, the guilt of the accused must be proved by the Crown, and the standard is proof beyond a reasonable doubt, not proof on the balance of proba-

⁶⁹ *Id.*, para. 94 per Major J. for unanimous Court.

⁷⁰ For commentary on s. 11(d), see Morton and Hutchison, *Presumption of Innocence* (1987); Charles, Cromwell and Jobson, *Evidence and the Charter of Rights and Freedoms* (1989), ch. 2; Beaudoin and Mendes, note 29, above, 855-872 (by S. Roy); Stuart, note 29, above, 355-360; McLeod, note 29, above, ch. 15; *Canadian Charter of Rights Annotated*, note 29, above, annotation to s. 11(d); the last work provides a bibliography of the relevant literature.

⁷¹ *Re Winship* (1970) 397 U.S. 358 (due process requires proof of guilt beyond a reasonable doubt).

bilities, which is the standard in civil cases.⁷² A determination of guilt requires proof beyond a reasonable doubt. In *R. v. Demers* (2004),⁷³ a person who had been declared unfit to stand trial objected to the fact that he remained in the criminal justice system, subject to annual reviews of his fitness to stand trial, as long as the Crown continued to have a prima facie case against him. He argued that it was a breach of the presumption of innocence to subject him to criminal charges for an indeterminate period based solely on a prima facie case that he committed the offence charged. The Supreme Court of Canada rejected the argument. The maintenance of criminal proceedings against him and the consequent restriction of his liberty were not equivalent to a determination of guilt. The prima facie case was sufficient to keep him in the criminal justice system.⁷⁴

(b) Reverse onus clauses

The presumption of innocence, which is conferred by s. 11(d) upon any person charged with an offence,⁷⁵ exists at common law, and finds expression in the rule that the Crown bears the burden of proving the guilt of the accused (instead of the accused having to prove his innocence), reinforced by the further rule that the standard of proof that must be satisfied by the Crown is proof beyond a reasonable doubt (instead of proof on the balance of probabilities).

Common law rules can of course be changed by apt legislation, and “reverse onus” clauses, which cast the burden of proof of some matters on the accused, are to be found in some statutes. In *R. v. Oakes* (1986),⁷⁶ the Supreme Court of Canada struck down a reverse onus clause in the federal Narcotic Control Act. The clause provided that proof that the accused was in possession of an illegal drug raised a presumption that the accused was in possession for the purpose of trafficking. The Supreme Court of Canada held that s. 11(d) required that the Crown must bear the burden of proving the guilt of a person charged with an offence, and the standard of the Crown’s proof must be the criminal standard of

72 The use by the Crown of similar fact evidence to prove that the accused committed an offence in circumstances similar to a previous offence is not a breach of the presumption of innocence, but the Crown must establish the admissibility of the similar fact evidence on the civil standard of the balance of probabilities, and then prove the guilt of the accused (with the aid of the similar fact evidence if admitted) beyond a reasonable doubt: *R. v. Arp* [1998] 3 S.C.R. 339 (upholding the use of similar fact evidence).

73 [2004] 2 S.C.R. 489.

74 *Id.*, paras. 32-36.

75 Section 11(d) has no application to civil proceedings, but a reverse onus clause in civil proceedings was struck down in *Little Sisters Book and Art Emporium v. Can.* [2000] 2 S.C.R. 1120, paras. 97-105. The clause placed the burden of challenging a customs determination on the importer, and in the context of expressive material this required the importer to prove that the material was not obscene. The Court held that the Crown must bear the burden of proving that material that is constitutionally protected by s. 2(b) of the Charter is obscene.

76 [1986] 1 S.C.R. 103. The majority opinion was written by Dickson C.J. with the concurrence of four others. Estey J., with whom McIntyre J. agreed, wrote a concurring opinion.

proof beyond a reasonable doubt. Any provision that imposed on the accused "the burden of disproving on a balance of probabilities an essential element of an offence" would be a breach of s. 11(d), because it would make it "possible for a conviction to occur despite the existence of a reasonable doubt".⁷⁷

The effect of the presumption in the Narcotic Control Act was that once the Crown proved beyond a reasonable doubt that the accused was in possession of an illegal drug (the proved fact), then the trier of fact was required⁷⁸ to make the inference that the accused was in possession for the purpose of trafficking (the presumed fact). This inference made the accused guilty of the offence of possession for the purpose of trafficking, which was a more serious offence than simple possession. The accused could rebut the presumption by proving that the presumed fact (purpose of trafficking) was not true. It is a general rule of the criminal law that, when an element of a criminal offence has to be disproved by the accused, the standard of proof is not the criminal one of proof beyond a reasonable doubt but the civil one of proof on the balance of probabilities. But the Court held that the lowering of the standard of proof did not make a reverse onus clause constitutional, because the clause still relieved the Crown of its constitutional duty to prove all elements of the offence to the criminal standard of proof beyond a reasonable doubt. In the case of the Narcotic Control Act's reverse onus clause, the accused might adduce sufficient evidence to raise a reasonable doubt as to whether the presumed fact (purpose of trafficking) was untrue, but not enough evidence to persuade the trier of fact on a balance of probabilities that the presumed fact was untrue. In that event, the reverse onus clause would require the accused to be convicted of possession for the purpose of trafficking, despite the fact that there was a reasonable doubt as to the existence of an essential element of the offence. It followed that the reverse onus clause violated s. 11(d), and the Court went on to hold that it was not saved by s. 1; the clause was therefore unconstitutional.

The reversal of the onus in *Oakes* related to "an essential element of the offence". In *R. v. Whyte* (1988),⁷⁹ the Supreme Court of Canada had to consider a reverse onus clause that did not relate to an essential element of the offence. The Criminal Code made it an offence to have the "care or control" of a motor vehicle while intoxicated. The Code provided that, where an accused occupied the driver's seat of a motor vehicle, he was deemed to have the care or control of the vehicle unless he established (proved on the balance of probabilities) "that he did not enter or mount the vehicle for the purpose of setting it in motion". The Crown

77 *Id.*, 132. Compare *R. v. Bray* (1983) 40 O.R. (2d) 766 (C.A.) (reverse onus with respect to grounds for bail, not an essential element of the offence, upheld); *R. v. Potvin* [1989] 1 S.C.R. 525 (reverse onus with respect to admission of evidence, not an essential element of the offence, upheld).

78 This was a "mandatory" presumption, because the trier of fact was required to infer the presumed fact (purpose of trafficking) from the proved fact (possession). A "permissive" presumption merely permits the trier of fact to make the inference of the presumed fact. A permissive presumption does not infringe s. 11(d); *R. v. Downey* [1992] 2 S.C.R. 10, 29 per Cory J. obiter for majority.

79 [1988] 2 S.C.R. 3. Dickson C.J. wrote the unanimous opinion of the Court.

argued that this clause did not infringe the presumption of innocence, because the intention of setting the vehicle in motion was not an element of the offence. The Court rejected the argument, holding that the presumption of innocence was infringed not only by a requirement to disprove an essential element of the offence but also by this requirement to disprove "a fact collateral to the substantive offence".⁸⁰ It made no difference whether the fact to be proved was characterized as "an essential element, a collateral factor, an excuse, or a defence".⁸¹ If the accused was required to prove some fact on the balance of probabilities in order to avoid conviction, then there was an infringement of the presumption of innocence, because the requirement "permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused".⁸² This reverse onus clause therefore infringed s. 11(d), although the Court went on to uphold the clause under s. 1 as a reasonable limit on the right with the purpose of preventing drunken driving.

The prohibition against reverse onus clauses applies even to excuses or defences.⁸³ It is an infringement of the presumption of innocence to impose on an accused person the burden of establishing (proving on the balance of probabilities) an excuse or a defence. The hate propaganda offence of the Criminal Code makes truth a defence, but casts upon the accused the burden of proving that the impugned statements are true. That is a breach of s. 11(d).⁸⁴ Many regulatory offences (public welfare offences) are offences of strict liability,⁸⁵ to which due diligence is a defence, but the burden of proving due diligence is imposed on the accused. That is also a breach of s. 11(d).⁸⁶ Even the defence of insanity infringes s. 11(d), because the Criminal Code enacts a presumption of sanity⁸⁷ and requires insanity

(Continued on page 51-19)

⁸⁰ *Id.*, 18.

⁸¹ *Ibid.*

⁸² *Ibid.* Folld. in *R. v. St-Onge Lamoureux* [2012] 3 S.C.R. 187, para. 27 (holding that presumptions of accuracy of breathalyzer tests infringed the presumption of innocence).

⁸³ But note *R. v. Holmes* [1988] 1 S.C.R. 914 and *R. v. Schwartz* [1988] 2 S.C.R. 443, where a majority of the Court held that an excusing provision was not a reverse onus clause.

⁸⁴ *R. v. Keegstra* [1990] 3 S.C.R. 697 (upholding the clause by a majority on the basis of s. 1); *R. v. Keegstra (No. 3)* [1996] 1 S.C.R. 458 (clause again upheld under s. 1 by a unanimous Court).

⁸⁵ For an explanation of strict liability, see ch. 47, Fundamental Justice, under heading 47.11, "Absolute and strict liability", above.

⁸⁶ *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154 (a majority of seven to two held that the reverse onus clause infringed s. 11(d), but the clause was upheld by the two votes that held that there was no breach of s. 11(d) plus the three votes that held that the clause should be upheld under s. 1).

⁸⁷ The relevant section of the Criminal Code has since been amended, the primary difference between the new sections and the old being that the term "insanity" has been replaced by the term "mental disorder".

to be proved by the accused.⁸⁸ In all these cases, the burden of proving the defence could not be placed on the accused, because that would “permit a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused”.⁸⁹ However, in all these cases, the Court’s bark was worse than its bite, because in each footnoted case the reversal of the onus of proving the defence was upheld under s. 1.

In all the reverse onus cases discussed so far, the challenged provision imposed on the accused a burden of persuasion — a burden of proving (or disproving) some fact on the balance of probabilities. In *R. v. Downey* (1992),⁹⁰ the Supreme Court of Canada had to review a provision that did not impose on the accused a burden of persuasion, but did impose a burden of adducing (or pointing to) evidence. The Criminal Code made it an offence to live off the avails of prostitution. The Code went on to provide that evidence that the accused “lives with or is habitually in the company of prostitutes” constituted, in the absence of evidence to the contrary, “proof that the [accused] lives on the avails of prostitution”. This provision, upon proof that the accused lived with a prostitute (the proved fact), cast upon the accused the burden of *raising a reasonable doubt* that the accused lived on the avails of prostitution (the presumed fact). At the most, the provision would require the accused to adduce evidence to raise a reasonable doubt as to whether he was living on the avails of prostitution. The provision would not require the accused himself to testify, since the testimony of other defence witnesses might suffice. The provision would not even require the accused to call defence evidence if a reasonable doubt emerged from the defence’s cross-examination of the Crown witnesses who testified as to the accused’s living with a prostitute (the fact that the Crown had to prove). Nevertheless, the Court held unanimously that this evidentiary presumption infringed the presumption of innocence in s. 11(d). According to Cory J. for the majority, “the fact that someone lives with a prostitute” (the proved fact) “does not lead inexorably to the conclusion that the person is living on avails” (the presumed fact).⁹¹ The absence of an “inexorable” connection between the proved fact and the presumed fact “can

88 *R. v. Chaulk* [1990] 3 S.C.R. 1303 (a majority of seven to two held that the reverse onus clause infringed s. 11(d), but all seven held that the clause should be upheld under s. 1); *folld.* in *R. v. Ratti* [1991] 1 S.C.R. 68; *R. v. Romeo* [1991] 1 S.C.R. 86. In *R. v. Daviault* [1994] 3 S.C.R. 63, the Court created a reverse onus clause, holding (without any statutory provision) that the defence of extreme intoxication had to be established by the accused on the balance of probabilities; the defence was said to be akin to insanity, so that the reversal of the onus was justified under s. 1. In *R. v. Stone* [1999] 2 S.C.R. 290, the Court created another reverse onus clause, holding that the defence of automatism had to be established by the accused on the balance of probabilities; the analogies of insanity and intoxication were invoked, and the reversal of the onus was said to be justified under s. 1.

89 *Id.*, 1330-1331.

90 [1992] 2 S.C.R. 10. The majority opinion was written by Cory J. with the concurrence of L’Heureux-Dubé, Sopinka and Gonthier JJ. McLachlin J., with the concurrence of Iacobucci J. and La Forest J., wrote dissenting opinions.

91 *Id.*, 30.

result in the conviction of an accused despite the existence of a reasonable doubt".⁹² This possibility (however unlikely) caused the evidentiary presumption to infringe s. 11(d). However, Cory J. upheld the provision under s. 1, relying on the Crown's difficulty in getting prostitutes to testify against their pimp, and the ease with which an innocent accused could rebut the merely evidentiary presumption.⁹³

In *R. v. Osolin* (1993),⁹⁴ there was a challenge to a provision of the Criminal Code that provided that, where an accused claimed that he had an honest belief that the complainant consented to his actions (it was a sexual assault in that case), the judge should put the defence to the jury "if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence". It was objected that, by its requirement of "sufficient evidence", this provision imposed a burden on the accused that was inconsistent with the presumption of innocence. The Supreme Court of Canada unanimously upheld the provision. Unlike the provision in *Downey*, this provision did not create any presumption. It simply required the accused to adduce or point to some evidence on the basis of which a jury could find that there was a reasonable doubt as to the existence of an honest belief. Indeed, although the Criminal Code provision addressed only the defence of mistaken belief, the same threshold had to be crossed in the case of all criminal defences before the trial judge could properly leave them to the jury. The *Osolin* case decides that the presumption of innocence is not infringed by a provision that does no more than impose on the accused the burden of adducing sufficient evidence to raise a reasonable doubt as to the presence or absence of some fact that is a defence (or an element of the offence, a collateral factor or an excuse). An evidentiary burden of this kind does not infringe s. 11(d), because the burden of proving all elements of the offence beyond a reasonable doubt remains on the Crown.

While s. 11(d) prohibits the reversal of the burden of proof of a fact that is an element of the offence, s. 11(d) has nothing to say about the *elimination* of an element of the offence. If Parliament were to take the more radical step of eliminating an element of an offence, the accused would be worse off than if the burden of disproving that element had been reversed. Yet the accused would be unable to invoke s. 11(d), because there would have been no interference with

92 *Ibid.* La Forest and McLachlin JJ., who dissented on the issue of s. 1 justification, expressly agreed with Cory J. on this issue.

93 Compare *R. v. Laba* [1994] 3 S.C.R. 965 (reverse onus clause casting burden of persuasion on accused could be justified under s. 1 if it only cast evidentiary burden on accused; held, clause should be modified accordingly).

94 [1993] 4 S.C.R. 595. The Court was unanimous on the point discussed in the text, although five opinions were written and the Court was divided on the outcome of the appeal.

the presumption of innocence.⁹⁵ Under s. 7, however, there are restrictions on the power of Parliament to eliminate elements of offences for which imprisonment is a punishment (imprisonment being a deprivation of "liberty").⁹⁶ For example, it is a violation of s. 7 to eliminate all requirement of fault (mens rea or negligence) from the elements of an offence;⁹⁷ in the case of "true crimes" (as opposed to "regulatory offences"), it is a violation of s. 7 to eliminate the requirement of mens rea;⁹⁸ in the case of murder and some other offences carrying special stigma, the Court has insisted on special levels of mens rea.⁹⁹ Thus, the elements of a serious criminal offence (one involving imprisonment) may include not only those enacted by the Parliament or Legislature, but also additional elements called for by s. 7's requirement of fundamental justice. Section 11(d) then reinforces s. 7 by requiring that all the elements of the offence, including those added under s. 7, must be proved by the Crown to the criminal standard of proof beyond a reasonable doubt.¹⁰⁰

(c) Fair and public hearing

Section 11(d) provides that a person charged with an offence is entitled to a "fair and public hearing".

The requirement that a hearing be "fair" is explicit in s. 11(d), but that has not deterred the Supreme Court of Canada from holding that the same requirement is implicit in the guarantee of fundamental justice of s. 7. In order to avoid repetition, I have discussed the cases in chapter 44, Fundamental Justice, above.¹⁰¹

The requirement of s. 11(d) that a hearing be "public" would entail a trial in open court, without restrictions on reporting by the media.¹⁰² However, it is likely that s. 1 of the Charter would sustain limited statutory provisions for closed trials, or for suppression of names or details where important privacy interests are at stake.

95 E.g., *R. v. Transport Robert* (2003) 68 O.R.(3d) 51 (C.A.), upholding offence from which the mental element of fault had been eliminated (absolute liability). There was no breach of s. 11(d), because no burden of proof was imposed on the accused (and there was no breach of s. 7 because the offence did not carry the punishment of imprisonment).

96 See ch. 47, Fundamental Justice, above.

97 E.g., *Re B.C. Motor Vehicle Act* [1985] 2 S.C.R. 486.

98 *R. v. Wholesale Travel Group* [1991] 3 S.C.R. 154.

99 E.g., *R. v. Vaillancourt* [1987] 2 S.C.R. 636.

100 *R. v. Penno* [1990] 2 S.C.R. 865, 897 (explaining relationship between ss. 7 and 11(d)).

101 See ch. 47, Fundamental Justice, under heading 47.21, "Fair trial", above.

102 *R. v. Sophonow (No. 2)* (1983) 150 D.L.R. (3d) 590 (Man. C.A.) (accused not entitled to pre-trial suppression of publicity regarding his case); *R. v. D.(G.)* (1991) 2 O.R. (3d) 498 (C.A.) (accused not entitled to suppression of his identity at trial). The issue of press access to trials has been raised by the press, not under s. 11(d) (since the press is not a "person charged with an offence"), but under s. 2(b) (freedom of expression). This is discussed in ch. 43, Expression, under heading 43.13, "Access to courts", above.

TAB O

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Beml, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theodore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Beml, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theodore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky et Robert Zilcosky *Appellants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de la Saskatchewan, procureur général de l'Alberta, Première nation Tsawwassen, Nation Haisla, bande indienne des Songhees, Première nation Malahat, Première nation des T'Sou-ke, Première nation Snaw-naw-as (Nanoose) et bande indienne de Beecher Bay (collectivement appelées Nations Te'mexw), Nation Heiltsuk, bande indienne des Musqueams, tribus Cowichan, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United

Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshahht First Nation and Assembly of First Nations *Intervenors*

Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, bande indienne Nee Tahi Buhn, Première nation Tseshahht et Assemblée des Premières nations *Intervenants*

INDEXED AS: R. v. KAPP

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Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

Présents : La juge en chef McLachlin et les juges Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Droit constitutionnel — Charte des droits — Droit à l'égalité — Programmes de promotion sociale — Lien entre les art. 15(1) et 15(2) de la Charte canadienne des droits et libertés — Portée et application de l'art. 15(2) — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le programme en cause est-il protégé par l'art. 15(2) de la Charte?

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Droit constitutionnel — Charte des droits — Maintien des droits et libertés des Autochtones — Droit à l'égalité — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — L'article 25 de la Charte canadienne des droits et libertés soustrait-il le programme en cause à l'accusation de discrimination?

Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing

Pêche — Pêche commerciale — Stratégie relative aux pêches autochtones — Permis de pêche communautaire délivré en vertu d'un programme pilote de vente et accordant aux membres de trois bandes autochtones le droit exclusif de pêcher le saumon pendant une période de 24 heures — Pêcheurs commerciaux, pour la plupart non autochtones, à qui il était interdit de pêcher pendant cette période, alléguant l'existence d'une atteinte à leurs droits à l'égalité en raison d'une mesure discriminatoire fondée sur la race — Le permis était-il conforme à la Constitution? — Charte canadienne des droits et libertés, art. 15.

La décision du gouvernement fédéral de favoriser la participation des Autochtones à la pêche commerciale est à l'origine de la Stratégie relative aux pêches autochtones. Cette stratégie a, dans une large mesure, consisté à établir trois programmes pilotes de vente, dont l'un a donné lieu à la délivrance, aux trois bandes autochtones, d'un permis de pêche communautaire autorisant les pêcheurs désignés par ces bandes à pêcher le saumon à l'embouchure du fleuve Fraser pendant une période de 24 heures, de même qu'à vendre leurs prises. Les appelants, tous des pêcheurs commerciaux, pour la plupart non autochtones, qui se sont vu interdire de pêcher pendant cette période de 24 heures, ont participé à une pêche de protestation et ont été accusés d'avoir pêché pendant une période interdite. Lors de leur procès, ils ont fait valoir que le permis de pêche communautaire était discriminatoire à leur égard en raison de leur race. Le juge de première instance a conclu que le permis délivré aux trois bandes portait atteinte aux droits à l'égalité garantis aux appelants par le par. 15(1) de la *Charte canadienne des droits et libertés*, et que cette atteinte n'était pas justifiée au regard de l'article premier de la *Charte*. Il a ordonné l'arrêt des procédures relatives à toutes les accusations. L'appel de la Couronne contre les déclarations sommaires de culpabilité a été accueilli. L'arrêt des procédures a été levé et des déclarations de culpabilité ont été inscrites contre les appelants. La Cour d'appel a maintenu cette décision.

Arrêt : Le pourvoi est rejeté. Le permis de pêche communautaire était conforme à la Constitution.

La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron et Rothstein : Le permis de pêche communautaire relève du par. 15(2) de la *Charte* et l'allégation des appelants voulant qu'il y ait eu violation de l'art. 15 ne saurait être retenue. [3]

Les paragraphes 15(1) et 15(2) ont pour effet combiné de promouvoir l'idée d'égalité réelle qui sous-tend l'ensemble de l'art. 15. Le paragraphe 15(1) a pour objet

governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [41] [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage

d'empêcher les gouvernements d'établir des distinctions fondées sur des motifs énumérés ou analogues ayant pour effet de perpétuer un désavantage ou un préjugé, ou d'imposer un désavantage fondé sur l'application de stéréotypes. Le paragraphe 15(2) vise à permettre aux gouvernements de combattre de manière proactive la discrimination au moyen de programmes destinés à aider des groupes défavorisés à améliorer leur situation. Grâce au par. 15(2), la *Charte* protège le droit des gouvernements de mettre en œuvre de tels programmes sans s'exposer à des contestations fondées sur le par. 15(1). Lorsqu'il fait face à une allégation fondée sur l'art. 15, le gouvernement peut établir que le programme contesté relève du par. 15(2) et est donc conforme à la Constitution. Si le gouvernement ne le fait pas, le programme doit alors être assujéti à un examen approfondi au regard du par. 15(1) afin de déterminer s'il a un effet discriminatoire. [16] [37] [40]

La distinction fondée sur un motif énuméré ou analogue qu'établit un programme gouvernemental n'est pas discriminatoire au sens de l'art. 15 si, au regard du par. 15(2), ce programme (1) a un objet améliorateur ou réparateur et (2) vise un groupe défavorisé caractérisé par un motif énuméré ou analogue. Compte tenu du libellé et de l'objet de la disposition, l'objectif législatif est la considération primordiale pour déterminer si un programme peut bénéficier de la protection du par. 15(2). Il n'est pas nécessaire que le programme vise uniquement un objet améliorateur. [41] [44] [48] [50] [57]

Le programme gouvernemental en cause dans la présente affaire est protégé par le par. 15(2) de la *Charte*. Le permis de pêche communautaire a été délivré conformément à une loi habilitante et à son règlement d'application, et il constitue une « loi[i], [un] programm[e] ou [une] activit[é] » au sens du par. 15(2). Le programme est aussi « destin[é] à améliorer la situation d'individus ou de groupes défavorisés ». La Couronne associe maints objectifs au programme, dont ceux consistant à parvenir à des solutions négociées relativement aux revendications de droits de pêche des peuples autochtones et à donner des possibilités de développement économique aux bandes autochtones afin de favoriser leur accession à l'autosuffisance. Les moyens choisis pour réaliser cet objectif (l'attribution aux collectivités autochtones de privilèges spéciaux en matière de pêche qui constituent un avantage) ont un lien rationnel avec la poursuite de cet objectif. La Couronne a donc prouvé que le programme avait un objet améliorateur crédible. Le programme vise également un groupe défavorisé caractérisé par un motif énuméré ou analogue. Les bandes qui se sont vu accorder l'avantage en question étaient défavorisées sur les plans du revenu et de l'éducation, et à maints autres égards.

suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

Ce désavantage historique perdure de nos jours. Le fait que certains membres des bandes ne soient pas nécessairement personnellement défavorisés n'annule pas le désavantage dont sont collectivement victimes les membres de ces bandes. Il s'ensuit que le programme ne porte pas atteinte au droit à l'égalité garanti par l'art. 15 de la *Charte*. [30] [57-59] [61]

En ce qui concerne l'art. 25 de la *Charte*, il n'est pas certain que le permis de pêche communautaire en cause tombe sous le coup de cet article. Le libellé de l'art. 25 et les exemples qu'on y trouve indiquent que seuls les droits de nature constitutionnelle sont susceptibles de bénéficier de la protection de l'art. 25. Même dans l'hypothèse où le permis de pêche relèverait effectivement de l'art. 25, la deuxième question est de savoir si la demande des appelants fondée sur l'art. 15 serait totalement irrecevable, contrairement à ce qui se produirait dans le cas d'une disposition servant à interpréter des droits garantis par la *Charte* qui sont susceptibles d'entrer en conflit. Il serait plus prudent que ces questions — qui soulèvent des considérations complexes extrêmement importantes pour que les droits des Autochtones puissent être conciliés de manière pacifique avec les intérêts de tous les Canadiens — soient tranchées au fur et à mesure qu'elles seront soulevées dans des cas particuliers. [63-65]

Le juge Bastarache : L'article 25 de la *Charte* fait obstacle à la contestation constitutionnelle des appelants fondée sur l'art. 15. Bien que la réaffirmation du critère adopté dans les motifs principaux à l'égard de l'application de l'art. 15 de la *Charte* soit acceptée, il n'est pas nécessaire de procéder à une analyse complète au regard de l'art. 15 avant de se demander si l'art. 25 s'applique. Il suffit d'établir l'existence d'un conflit potentiel entre le programme pilote de vente et l'art. 15. [75] [77] [108]

L'article 25 n'est pas une simple norme d'interprétation. Il a pour objectif de protéger les droits des peuples autochtones lorsque l'application des protections établies dans la *Charte* à l'endroit des individus diminuerait l'identité distinctive, collective et culturelle d'un groupe autochtone. Cette interprétation s'accorde avec la formulation et l'historique de la disposition. L'article 25 qui sert de bouclier contre les incidences de la *Charte* sur les droits et les libertés des peuples autochtones est restreint par l'art. 28 de la *Charte*, qui établit l'égalité des sexes « [i]ndépendamment des autres dispositions de la présente charte ». Il est également limité à son objet, les droits et libertés garantis par la *Charte* étant juxtaposés aux droits et libertés des peuples autochtones. Cela signifie, pour l'essentiel, que seules les lois qui portent véritablement atteinte à des droits des peuples autochtones seront prises en considération, et non celles qui ont uniquement des effets accessoires sur les Autochtones. [80-81] [89] [93] [97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aborigines and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aborigines pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing

La mention à l'art. 25 des « droits ou libertés ancestraux et issus de traités » indique que la disposition est axée sur le caractère tout à fait particulier des personnes ou des collectivités mentionnées dans la Constitution; les droits protégés sont ceux qui leur sont propres en raison de leur statut spécial. Un texte législatif qui fait une distinction entre Autochtones et non-Autochtones afin de protéger des intérêts liés à la culture, au territoire ou à la souveraineté autochtones, ou au processus des traités, mérite d'être soustrait à l'examen fondé sur la *Charte*. Les lois adoptées en vertu de la compétence établie au par. 91(24) de la *Loi constitutionnelle de 1867* feraient normalement partie de cette catégorie, cette compétence concernant les peuples autochtones en tant que tels, mais pas les lois visées par l'art. 88 de la *Loi sur les Indiens*, puisqu'il s'agit par définition de lois d'application générale. Sont compris dans les droits et libertés « autres » à l'art. 25 les droits d'origine législative qui visent à protéger des intérêts liés à la culture, au territoire et à l'autonomie gouvernementale des Autochtones, ainsi que les accords de règlement qui remplacent des droits ancestraux ou issus de traités. Mais les droits privés dont jouissent les Autochtones sur le plan individuel, à titre privé, en tant que citoyens canadiens comme les autres, ne seraient pas protégés. L'article 25 traduit la nécessité impérieuse de trouver des accommodements aux intérêts des peuples autochtones, de les reconnaître et de les concilier. [103] [105-106]

L'application de l'art. 25 comporte trois étapes. La première exige une évaluation de la revendication afin d'établir la nature du droit fondamental garanti par la *Charte* et de déterminer si le bien-fondé de la revendication a été établi à première vue. La deuxième étape consiste à évaluer le droit autochtone afin de déterminer s'il relève de l'art. 25. La troisième étape consiste à déterminer s'il existe un conflit véritable entre le droit garanti par la *Charte* et le droit autochtone. [111]

En l'espèce, il existe une preuve *prima facie* de discrimination selon le par. 15(1). Le droit conféré par le programme pilote de vente est limité aux Autochtones et a un effet préjudiciable aux pêcheurs commerciaux non autochtones actifs dans la même région que les bénéficiaires du programme. Il est clair aussi que le désavantage est lié à des différences raciales. Le droit autochtone est visé par l'art. 25. Le rapport tout à fait particulier des communautés autochtones de la Colombie-Britannique avec la pêche devrait suffire à établir un lien entre le droit de pêche donné aux Autochtones en vertu du programme pilote de vente et les droits envisagés à l'art. 25. Le droit de pêche a constamment fait l'objet de revendications fondées sur les droits ancestraux et les droits issus de traités, soit les termes énumérés dans les dispositions. En outre, la Couronne elle-même a prétendu

a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

Cases Cited

By McLachlin C.J. and Abella J.

Considered: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; **referred to:** *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, rev'd in part (1988), 55 Man. R. (2d) 263; *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, rev'd (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, aff'd (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

By Bastarache J.

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education*

que ces droits constituaient une première étape vers la constitution d'un droit issu d'un traité et l'art. 25 reflète les notions de réconciliation et de négociation présentes dans le processus des traités. Enfin, le droit dont il est question en l'espèce dépend entièrement de l'exercice des pouvoirs conférés au Parlement par le par. 91(24) de la *Loi constitutionnelle de 1867*, qui concerne les Indiens. On ne peut interpréter la *Charte* comme si elle rendait inconstitutionnel l'exercice de pouvoirs conformes aux objectifs du par. 91(24), et il n'est pas logique de croire que tout exercice de la compétence établie au par. 91(24) exige une justification en vertu de l'article premier de la *Charte*. L'article 25 est un compagnon indissociable du par. 35(1) de la *Loi constitutionnelle de 1982*; il protège les objectifs du par. 35(1) et accroît la portée des mesures nécessaires pour que soit remplie la promesse de réconciliation. Il existe également un conflit véritable en l'espèce puisque l'application du droit à l'égalité reconnu à tous en vertu de l'art. 15 n'est pas compatible avec les droits des pêcheurs autochtones titulaires de permis dans le cadre du programme pilote de vente. Par conséquent, l'art. 25 de la *Charte* s'applique en l'espèce et constitue une réponse complète à la revendication. [116] [119-123]

Jurisprudence

Citée par la juge en chef McLachlin et la juge Abella

Arrêts examinés : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; **arrêts mentionnés :** *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *R. c. Van der Peet*, [1996] 2 R.C.S. 507; *Delgamuukw c. Colombie-Britannique*, [1997] 3 R.C.S. 1010; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Athabasca Tribal Council c. Compagnie de pétrole Amoco Canada Ltée*, [1981] 1 R.C.S. 699; *Lovelace c. Ontario*, [2000] 1 R.C.S. 950, 2000 CSC 37; *Manitoba Rice Farmers Association c. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, inf. en partie par (1988), 55 Man. R. (2d) 263; *R. c. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, inf. par (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, conf. par (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron c. Trudel*, [1995] 2 R.C.S. 418; *Corbiere c. Canada (Ministre des Affaires indiennes et du Nord canadien)*, [1999] 2 R.C.S. 203.

Citée par le juge Bastarache

Arrêts mentionnés : *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497; *R. c. Ulybel Enterprises Ltd.*, [2001] 2 R.C.S. 867, 2001 CSC 56; *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217; *Renvoi relatif au projet de loi 30, An Act to amend the Education Act*

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. *The Purpose of Section 15*

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

1. *L'objet de l'art. 15*

[14] Près de 20 années se sont écoulées depuis l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, la première décision de la Cour portant sur l'art. 15. L'arrêt *Andrews* établit le modèle à suivre en ce qui concerne l'importance que notre Cour attache à l'égalité réelle — un modèle qui a été enrichi mais qui n'a jamais été abandonné par la jurisprudence ultérieure.

[15] L'égalité réelle, comparativement à l'égalité formelle, repose sur l'idée que « [f]avoriser l'égalité emporte favoriser l'existence d'une société où tous ont la certitude que la loi les reconnaît comme des êtres humains qui méritent le même respect, la même déférence et la même considération » : arrêt *Andrews*, p. 171, le juge McIntyre s'exprimant au nom des juges majoritaires au sujet de la question de l'art. 15. Soulignant que l'égalité ne signifie pas nécessairement traitement identique et que le modèle formel du « traitement analogue » peut en fait engendrer des inégalités, le juge McIntyre a ajouté (p. 165) :

Pour s'approcher de l'idéal d'une égalité complète et entière devant la loi et dans la loi — et dans les affaires humaines une approche est tout ce à quoi on peut s'attendre — la principale considération doit être l'effet de la loi sur l'individu ou le groupe concerné. Tout en reconnaissant qu'il y aura toujours une variété infinie de caractéristiques personnelles, d'aptitudes, de droits et de mérites chez ceux qui sont assujettis à une loi, il faut atteindre le plus possible l'égalité de bénéfice et de protection et éviter d'imposer plus de restrictions, de sanctions ou de fardeaux à l'un qu'à l'autre. En d'autres termes, selon cet idéal qui est certes impossible à atteindre, une loi destinée à s'appliquer à tous ne devrait pas, en raison de différences personnelles non pertinentes, avoir un effet plus contraignant ou moins favorable sur l'un que sur l'autre.

Tout en reconnaissant que l'égalité est un concept intrinsèquement comparatif (p. 164), le juge

against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual

McIntyre a mis en garde contre l'adoption d'un critère stérile de la situation analogue qui serait axé sur l'égalité de traitement des individus égaux. L'insistance sur l'égalité réelle est demeurée au cœur de l'approche que la Cour a adoptée à l'égard des demandes fondées sur le droit à l'égalité.

[16] Les paragraphes 15(1) et 15(2) ont pour effet combiné de promouvoir l'idée d'égalité réelle qui sous-tend l'ensemble de l'art. 15. Le paragraphe 15(1) vise à empêcher les distinctions discriminatoires ayant un effet négatif sur les membres des groupes caractérisés par les motifs énumérés à l'art. 15 ou par des motifs analogues. Il s'agit là d'une façon de combattre la discrimination. Cependant, les gouvernements peuvent également souhaiter le faire au moyen de programmes destinés à aider des groupes défavorisés à améliorer leur situation. Grâce au par. 15(2), la *Charte* protège le droit des gouvernements de mettre en œuvre de tels programmes sans s'exposer à des contestations fondées sur le par. 15(1). C'est ce qui ressort de l'existence du par. 15(2). Donc, les par. 15(1) et 15(2) ont pour effet combiné de confirmer l'objet de l'art. 15 qui est de favoriser l'égalité réelle.

[17] Le modèle établi dans l'arrêt *Andrews*, qui a été explicité dans une série de décisions ayant abouti à l'arrêt *Law c. Canada (Ministre de l'Emploi et de l'Immigration)*, [1999] 1 R.C.S. 497, établissait essentiellement un critère à deux volets devant être utilisé pour démontrer l'existence de discrimination au sens du par. 15(1) : (1) La loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue? (2) La distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? Il était question de trois volets dans l'arrêt *Law*, mais nous estimons que le critère est essentiellement le même.

[18] Dans l'arrêt *Andrews*, le juge McIntyre a examiné l'effet discriminatoire en fonction de deux concepts : (1) la perpétuation d'un préjugé ou d'un désavantage dont les membres d'un groupe sont victimes en raison de caractéristiques personnelles décrites dans les motifs énumérés et analogues, et (2) l'application de stéréotypes fondés sur ces motifs qui donne lieu à une décision ne correspondant pas

circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as “attributed rather than actual characteristics” (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the “human dignity” of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group’s reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court’s approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*’ interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made

à la situation et aux caractéristiques réelles d’un demandeur ou d’un groupe. Par exemple, l’affaire *Andrews* a été tranchée en fonction du deuxième concept; la Cour a jugé que l’interdiction de pratiquer le droit dont faisaient l’objet les personnes n’ayant pas la citoyenneté était fondée sur un stéréotype selon lequel ces personnes ne pouvaient pas exercer *correctement* les fonctions d’un avocat en Colombie-Britannique — une conception qui privait ces gens d’un privilège non pas en raison de leurs mérites et de leurs capacités, mais en raison de ce que le rapport de la Commission royale sur l’égalité en matière d’emploi (1984) a qualifié de « caractéristiques qui leur sont prêtées à tort » (p. 2). En outre, le juge McIntyre a souligné qu’une conclusion à l’existence de discrimination pourrait reposer sur le fait qu’une loi ou un programme avait pour effet de perpétuer le désavantage dont était victime un groupe caractérisé par un motif énuméré à l’art. 15 ou par un motif analogue. Dans ce contexte, il a affirmé ceci (p. 174) :

J’affirmerais alors que la discrimination peut se décrire comme une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d’un individu ou d’un groupe d’individus, qui a pour effet d’imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d’autres ou d’empêcher ou de restreindre l’accès aux possibilités, aux bénéfices et aux avantages offerts à d’autres membres de la société.

[19] Dix années plus tard, dans l’arrêt *Law*, notre Cour a proposé que la discrimination soit définie en fonction de l’effet de la loi ou du programme sur la « dignité humaine » des membres du groupe demandeur, eu égard à quatre facteurs contextuels : (1) le désavantage préexistant dont peut être victime le groupe demandeur; (2) le degré de correspondance entre la différence de traitement et la situation réelle du groupe demandeur; (3) la question de savoir si la loi ou le programme a un objet ou un effet améliorateur; (4) la nature du droit touché (par. 62-75).

[20] L’arrêt *Law* a réussi à unifier ce qui, depuis l’arrêt *Andrews*, était devenu une division dans l’approche de notre Cour relative à l’art. 15. L’arrêt *Law* est parvenu à le faire en réitérant et en confirmant l’interprétation donnée dans l’arrêt *Andrews*, selon laquelle l’art. 15 garantit l’égalité réelle et

an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity as a legal test. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.¹ Criticism has also accrued for the way *Law* has allowed the

non seulement formelle. De plus, l'arrêt *Law* nous a beaucoup aidé à comprendre le fondement conceptuel de l'égalité réelle.

[21] En même temps, plusieurs difficultés ont découlé de la tentative, dans l'arrêt *Law*, de faire de la dignité humaine un critère juridique. Il ne fait aucun doute que la dignité humaine est une valeur essentielle qui sous-tend le droit à l'égalité garanti par l'art. 15. En fait, la protection de tous les droits garantis par la *Charte* est guidée par la promotion de la dignité de l'être humain. Comme le juge en chef Dickson l'a affirmé dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103 :

Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société. [p. 136]

[22] Toutefois, comme l'ont souligné des détracteurs, la dignité humaine est une notion abstraite et subjective qui non seulement peut être déroutante et difficile à appliquer même avec l'aide des quatre facteurs contextuels, mais encore s'est avérée un fardeau *additionnel* pour les parties qui revendiquent le droit à l'égalité, au lieu d'être l'éclaircissement philosophique qu'elle était censée constituer¹.

¹ Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 *Can. Bar Rev.* 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004), 15 *N.J.C.L.* 3; Christopher D. Bredt and Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003), 20 *S.C.L.R.* (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 *McGill L.J.* 627; Daniel Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert et Diana Majury, "Critical Comparisons: The Supreme Court of Canada DooMS Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, "La dignité dans la

¹ Donna Greschner, « Does *Law* Advance the Cause of Equality? » (2001), 27 *Queen's L.J.* 299; Sheilah Martin, « Balancing Individual Rights to Equality and Social Goals » (2001), 80 *R. du B. can.* 299; Donna Greschner, « The Purpose of Canadian Equality Rights » (2002), 6 *R. études const.* 291; Debra M. McAllister, « Section 15 — The Unpredictability of the *Law* Test » (2003-2004), 15 *R.N.D.C.* 3; Christopher D. Bredt et Adam M. Dodek, « Breaking the *Law*'s Grip on Equality : A New Paradigm for Section 15 » (2003), 20 *S.C.L.R.* (2d) 33; Daphne Gilbert, « Time to Regroup : Rethinking Section 15 of the *Charter* » (2003), 48 *R.D. McGill* 627; Daniel Proulx, « Le concept de dignité et son usage en contexte de discrimination : deux Chartes, deux modèles », [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert et Diana Majury, « Critical Comparisons : The Supreme Court of Canada DooMS Section 15 » (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, « La dignité dans

formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.²

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping

Les critiques se sont aussi accumulées à l'égard de la façon dont l'arrêt *Law* a permis au formalisme de certains arrêts de la Cour ultérieurs à l'arrêt *Andrews* de ressurgir sous la forme d'une analyse comparative artificielle axée sur l'égalité de traitement des individus égaux².

[23] Comme la Cour le reconnaît dans l'arrêt *Law* même, il est plus utile d'analyser, dans chaque cas, les facteurs qui permettent de reconnaître l'effet discriminatoire. Les quatre facteurs énoncés dans l'arrêt *Law* sont fondés sur la qualification, dans l'arrêt *Andrews*, de la perpétuation

Charte des droits et libertés de la personne: de l'ubiquité à l'ambiguïté d'une notion fondamentale", in *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at pp. 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), at pp. 80-82.

² Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dumps Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale », dans *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 143; R. James Fyfe, « Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada » (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5^e éd. suppl. 2007), vol. 2, p. 55-28 et 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), p. 80-82.

² Sophia Reibetanz Moreau, « Equality Rights and the Relevance of Comparator Groups » (2006), 5 *J.L. & Equality* 81; Daphne Gilbert et Diana Majury, « Critical Comparisons: The Supreme Court of Canada Dumps Section 15 » (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, « Equality, Comparison, Discrimination, Status », dans Fay Faraday, Margaret Denike et M. Kate Stephenson, dir., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, « Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All? », dans Sheila McIntyre et Sandra Rodgers, dir., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. Voir aussi Dianne Pothier, « Connecting Grounds of Discrimination to Real People's Real Experiences » (2001), 13 *R.F.D.* 37; Bruce Ryder, Cidalia C. Faria et Emily Lawrence, « What's Law Good For? An Empirical Overview of Charter Equality Rights Decisions » (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, « Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee », dans Sheila McIntyre et Sandra Rodgers, dir., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, « Deference and Dominance: Equality Without Substance », dans Sheila McIntyre et Sandra Rodgers, dir., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

d'un désavantage et de l'application de stéréotypes comme étant les principaux indices de discrimination, et se rapportent à cette qualification. La préexistence d'un désavantage et la nature du droit touché (les premier et quatrième facteurs énoncés dans l'arrêt *Law*) concernent la perpétuation d'un désavantage et d'un préjugé, alors que le deuxième facteur a trait à l'application de stéréotypes. L'objet ou l'effet améliorateur d'une loi ou d'un programme (le troisième facteur énuméré dans l'arrêt *Law*) concerne la question de savoir si la mesure en question a un objet réparateur au sens du par. 15(2). (Nous dirions, sans pour autant le décider ici, que le troisième facteur énuméré dans l'arrêt *Law* pourrait aussi être pertinent pour trancher la question qui, aux fins d'application du par. 15(1), est de savoir si la loi ou le programme en cause a pour effet de perpétuer un désavantage.)

[24] Considéré sous cet angle, l'arrêt *Law* ne prescrit pas l'application d'un nouveau critère distinctif pour déterminer l'existence de discrimination, mais il confirme plutôt l'approche relative à l'égalité réelle visée par l'art. 15, qui a été énoncée dans l'arrêt *Andrews* et explicitée dans de nombreux arrêts subséquents. Les facteurs énoncés dans l'arrêt *Law* doivent être interprétés non pas littéralement comme s'il s'agissait de dispositions législatives, mais comme un moyen de mettre l'accent sur le principal enjeu de l'art. 15, qui a été décrit dans l'arrêt *Andrews* — la lutte contre la discrimination, au sens de la perpétuation d'un désavantage et de l'application de stéréotypes.

[25] Comme nous l'avons vu, l'objectif primordial que représente la lutte contre la discrimination sous-tend à la fois le par. 15(1) et le par. 15(2). Le paragraphe 15(1) a pour objet d'*empêcher* les gouvernements d'établir des distinctions fondées sur des motifs énumérés ou analogues qui ont pour effet de perpétuer un désavantage ou un préjugé dont un groupe est victime, ou qui imposent un désavantage fondé sur l'application de stéréotypes. Le paragraphe 15(2) vise à *permettre* aux gouvernements de combattre de manière proactive la discrimination existante grâce à l'adoption de mesures de promotion sociale.

TAB P

R.D.S. Appellant

v.

Her Majesty The Queen Respondent

and

The Women's Legal Education and Action Fund, the National Organization of Immigrant and Visible Minority Women of Canada, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada Interveners

INDEXED AS: R. v. S. (R.D.)

File No.: 25063.

1997: March 10; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Courts — Judges — Impartiality — Reasonable apprehension of bias — Testimony of the only two witnesses (accused and police officer) at odds and that of accused accepted — Police officer white and accused a black youth — Oral reasons making reference to police and racism in general context — Youth Court Judge's comments not tied to officer appearing before the Court — Whether reasonable apprehension of bias.

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons,

R.D.S. Appellant

c.

Sa Majesté la Reine Intimée

et

Le Fonds d'action et d'éducation juridiques pour les femmes, l'Organisation nationale des femmes immigrantes et des femmes appartenant à une minorité visible au Canada, l'African Canadian Legal Clinic, l'Afro-Canadian Caucus of Nova Scotia et le Congrès des femmes noires du Canada Intervenants

RÉPERTOIRE: R. c. S. (R.D.)

N° du greffe: 25063.

1997: 10 mars; 1997: 26 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Tribunaux — Juges — Impartialité — Crainte raisonnable de partialité — Les témoignages des deux seuls témoins (l'accusé et un policier) diffèrent et celui de l'accusé est accepté — Le policier est de race blanche et l'accusé est un jeune Noir — Des motifs prononcés oralement font référence aux policiers et au racisme dans un contexte général — Les remarques du juge du tribunal pour adolescents ne visent pas le policier qui a comparu devant la Cour — Y a-t-il crainte raisonnable de partialité?

Un policier de race blanche a arrêté un jeune Noir âgé de quinze ans à qui l'on reprochait d'avoir gêné l'arrestation d'un autre jeune. L'inculpé a été accusé d'avoir illégalement exercé des voies de fait contre un policier, d'avoir illégalement exercé des voies de fait contre un policier dans l'intention d'empêcher une arrestation et d'avoir illégalement résisté à un policier agissant dans l'exercice de ses fonctions. Le policier et l'accusé étaient les deux seuls témoins et leurs versions des événements pertinents étaient largement différentes. Le juge du tribunal pour adolescents a apprécié les témoi-

the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal. At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be allowed.

(1) *Consideration of Supplementary Reasons*

Per curiam: The supplementary reasons issued by the Youth Court Judge after the appeal had been filed could not be taken into account in assessing whether her reasons gave rise to a reasonable apprehension of bias.

(2) *Reasonable Apprehension of Bias*

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

gnages et a conclu que l'accusé devait être acquitté. Dans des motifs prononcés oralement, le juge a fait remarquer en réponse à une question de pure forme du ministère public qu'il était déjà arrivé que des policiers trompent la cour et réagissent avec excès, particulièrement vis-à-vis de groupes non blancs, et que cela semblait dénoter un état d'esprit suspect. Elle a également déclaré que ses remarques ne visaient pas le policier qui a témoigné devant la cour. Le ministère public a contesté ces remarques parce qu'elles suscitaient une crainte raisonnable de partialité. Après le prononcé de ses motifs et le dépôt de l'appel du ministère public devant la Cour suprême de la Nouvelle-Écosse (Section de première instance), le juge a déposé des motifs supplémentaires où elle s'est expliquée plus en détail sur ses impressions quant à la crédibilité des deux témoins et sur le contexte dans lequel elle avait formulé ses commentaires. L'appel du ministère public a été accueilli et la tenue d'un nouveau procès a été ordonnée pour le motif que les remarques du juge avaient suscité une crainte raisonnable de partialité. Cette décision a été confirmée dans un arrêt majoritaire de la Cour d'appel de la Nouvelle-Écosse. La question litigieuse dans le présent pourvoi consiste à savoir si les commentaires faits par le juge ont suscité une crainte raisonnable de partialité.

Arrêt (le juge en chef Lamer et les juges Sopinka et Major sont dissidents): Le pourvoi est accueilli.

(1) *Prise en considération des motifs supplémentaires*

La Cour: Les motifs supplémentaires déposés par le juge du tribunal pour adolescents après le dépôt de l'appel ne pouvaient être pris en considération pour déterminer si ses motifs ont suscité une crainte raisonnable de partialité.

(2) *Crainte raisonnable de partialité*

Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: Les cours de justice devraient respecter les plus hautes normes d'impartialité. L'équité et l'impartialité doivent être à la fois subjectivement présentes et objectivement démontrées dans l'esprit de l'observateur renseigné et raisonnable. Si les paroles ou les actes du juge qui préside suscitent, chez l'observateur renseigné et raisonnable, une crainte raisonnable de partialité, cela rend le procès inéquitable. Les juges doivent être particulièrement sensibles à la nécessité non seulement d'être équitables, mais de paraître, aux yeux de tous les observateurs raisonnables, équitables envers les Canadiens de toute race, religion, nationalité et origine ethnique.

If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct. However, if the judge's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

The basic interests of justice require that the appellate courts, notwithstanding their deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, retain some scope to review that determination given the serious and sensitive issues raised by an allegation of bias.

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a

Si les paroles ou la conduite du juge suscitent une crainte de partialité ou dénotent réellement sa partialité, celui-ci excède sa compétence. On peut remédier à cet excès de compétence en présentant une requête en récusation adressée au juge présidant l'instance si celle-ci se poursuit, ou en demandant l'examen en appel de la décision du juge. S'il y a crainte raisonnable de partialité, c'est l'ensemble des procédures du procès qui sont viciées et la décision subséquente aussi bien fondée soit-elle ne peut y remédier. Le simple fait que le juge paraît, sur certains points, avoir tiré des conclusions justes quant à la crédibilité ou qu'il arrive à un résultat correct ne peut dissiper les effets de la crainte raisonnable de partialité que d'autres paroles ou actes du juge ont pu susciter. Toutefois, si les paroles ou la conduite du juge, eu égard au contexte, ne suscitent pas de crainte raisonnable de partialité, ses conclusions n'en seront pas entachées, quelque inquiétantes qu'elles puissent être.

Les intérêts fondamentaux de la justice exigent que les cours d'appel, malgré la norme d'examen fondée sur la retenue qu'elles ont adoptée dans l'analyse des conclusions factuelles des tribunaux d'instance inférieure, dont les conclusions relatives à la crédibilité des témoins, conservent un certain regard sur cette détermination vu les questions graves et délicates que soulève l'allégation de partialité.

L'impartialité peut être décrite comme l'état d'esprit de l'arbitre désintéressé eu égard au résultat et susceptible d'être persuadé par la preuve et les arguments soumis. Par contraste, la partialité dénote un état d'esprit prédisposé de quelque manière à un certain résultat ou fermé sur certaines questions. Lorsqu'on allègue la partialité du décideur, le critère à appliquer consiste à se demander si la conduite particulière suscite une crainte raisonnable de partialité. Il n'est pas nécessaire d'établir l'existence de la partialité dans les faits parce qu'il est habituellement impossible de déterminer si le décideur a abordé l'affaire avec des idées réellement préconçues.

La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Ce critère consiste à se demander à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Ce critère comporte un double élément objectif: la personne examinant l'allégation de partialité doit être raisonnable, et la crainte de partialité doit elle-même être raisonnable eu égard aux circonstances de l'affaire. De plus, la personne raisonnable doit être une personne bien renseignée, au courant de l'ensemble des circonstances pertinentes, y compris des tra-

part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

Consideration of whether the existence of anti-black racism in society is a proper subject for judicial notice would be inappropriate here because an intervenor and not the appellant put forward the argument with respect to judicial notice.

The individualistic nature of a determination of credibility and its dependence on intangibles such as demeanour and the manner of testifying requires the judge, as trier of fact, to be particularly careful and to appear to be neutral. When making findings of credibility a judge should avoid making any comment that might suggest that the determination of credibility is based on generalizations or stereotypes rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made.

ditions historiques d'intégrité et d'impartialité, et consciente aussi du fait que l'impartialité est l'une des obligations que les juges ont fait le serment de respecter. La personne raisonnable est également censée connaître la réalité sociale sous-jacente à une affaire donnée, et être sensible par exemple à l'ampleur du racisme ou des préjugés fondés sur le sexe dans une collectivité donnée. La jurisprudence indique qu'il faut établir une réelle probabilité de partialité et qu'un simple soupçon est insuffisant. L'existence d'une crainte raisonnable de partialité sera entièrement fonction des faits. Il faut faire preuve de rigueur pour conclure à la partialité et la charge d'établir la partialité incombe à la personne qui en allègue l'existence. Le critère s'applique également à tous les juges, indépendamment de leur formation, de leur sexe, de leur race, de leur origine ethnique et de toute autre caractéristique.

Rester neutre pour le juge ce n'est pas faire abstraction de toute son expérience de la vie. Les faits détermineront s'il convient, au vu des circonstances, de prendre en considération le contexte social et si les paroles prononcées suscitent une crainte raisonnable de partialité. Il existe une différence très importante entre les affaires dans lesquelles le contexte social est invoqué pour assurer l'adéquation du droit et de la réalité sociale et celles comme la présente espèce, où le contexte social est apparemment utilisé pour trancher une question de crédibilité.

Il ne convient pas d'étudier la question de savoir s'il appartenait au juge de prendre connaissance d'office de l'existence dans la société de racisme anti-noir parce que l'argument relatif à la connaissance d'office a été avancé par un intervenant et non par l'appelant.

C'est en raison de la nature personnelle de la détermination de la crédibilité et du fait qu'elle repose sur des éléments intangibles comme le comportement et la manière de témoigner que le juge, en tant que juge des faits, est tenu de prendre bien soin d'être et de paraître neutre. Il vaut mieux que le juge appelé à statuer sur la crédibilité évite de faire tout commentaire qui pourrait donner l'impression qu'il a jugé de la crédibilité en s'appuyant sur des généralisations ou des stéréotypes plutôt que sur des démonstrations précises de la véracité ou du manque d'honnêteté du témoin au procès. Quand ils commencent leur déposition, tous les témoins doivent être traités sur un pied d'égalité, sans considération de race, religion, nationalité, sexe, occupation ou autre caractéristique. C'est seulement après qu'un témoin a été jaugé et évalué qu'on peut décider de sa crédibilité.

Situations where there is no evidence linking the generalization to the particular witness might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. Although the particular generalization might be well-founded, reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility.

That judges should avoid making comments based on generalizations when assessing the credibility does not lead automatically to a conclusion of reasonable apprehension of bias. In some limited circumstances, the comments may be appropriate.

The argument that the trial was rendered unfair for failure to comply with "natural justice" could not be accepted. Neither the police officer nor the Crown was on trial.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Judges, while they can never be neutral in the sense of being purely objective, must strive for impartiality. Their differing experiences appropriately assist in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence.

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony from expert witnesses, from academic studies properly placed

Si aucune preuve ne relie la généralisation à un témoin en particulier, le juge pourrait, en pareille situation, prêter le flanc à des allégations de partialité du fait qu'il aurait préjugé de la crédibilité du témoin en fonction de généralisations stéréotypées. Bien que la généralisation en cause ne soit peut-être pas sans fondement, les gens raisonnables et renseignés peuvent avoir l'impression que le juge a basé son évaluation de la crédibilité sur cette donnée, au lieu de procéder à une réelle appréciation de la preuve constituée par la déposition de ce témoin en particulier.

Affirmer que les juges doivent éviter de faire des commentaires basés sur des généralisations lorsqu'ils apprécient la crédibilité de témoins n'amène pas *ipso facto* à conclure qu'il en résulte une crainte raisonnable de partialité. Dans un certain nombre de cas limités, les commentaires peuvent être à propos.

L'argument selon lequel le procès avait été inéquitable parce qu'il y avait eu transgression des règles de justice naturelle était indéfendable. Ce n'était pas le procès du policier, ni celui du ministère public.

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Si le juge ne peut jamais être neutre, c'est-à-dire parfaitement objectif, il peut et doit néanmoins s'efforcer d'atteindre l'impartialité. Ce critère suppose donc qu'il est légitime que l'expérience personnelle de chaque juge soit mise à profit et marque ses jugements, à condition que cette expérience ait un rapport avec la cause qu'il entend, qu'elle ne soit pas fondée sur des stéréotypes malvenus, et qu'elle n'empêche pas la résolution équitable et juste de l'affaire à la lumière des faits admis en preuve.

La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. La personne raisonnable doit connaître et comprendre le processus judiciaire, l'exercice de la justice ainsi que la collectivité où le crime reproché a été commis. La personne raisonnable exige que le juge fasse preuve d'impartialité et soit à juste titre influencé dans ses délibérations par sa propre conception du monde. Enfin, elle s'attend à ce que le juge procède avec un esprit ouvert à l'examen prudent, détaché et circonspect de la réalité complexe de chaque affaire dont il est saisi.

L'examen du contexte par le juge permet de définir le cadre nécessaire à l'interprétation et à l'application de la loi. Le juge peut se faire une idée claire du contexte ou de l'historique, ce qui est essentiel pour rendre justice, en faisant fond sur les témoignages d'experts, sur les

before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is a precondition of impartiality. A reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.

The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. Awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

(3) *Application of the Test*

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The oral reasons at issue should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment. They indicated that the Youth Court Judge approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which was entirely proper and conducive to a fair and just resolution of the case before her. Although the Judge did not make a finding of racism, there was evidence on which such a finding could be made.

ouvrages de doctrine dûment produits en preuve ainsi que sur sa propre compréhension et son expérience de la société au sein de laquelle il vit et travaille. Ce processus d'ouverture est une condition préalable à l'impartialité. Loïn d'être préoccupée par ce processus, la personne raisonnable y voit un important outil de l'impartialité du juge.

La personne raisonnable aborde la question de savoir s'il y a une crainte raisonnable de partialité, bien au fait de la complexité et du contexte des points litigieux. Elle comprend qu'il est impossible au juge d'être neutre, mais elle exige son impartialité. Elle connaît la dynamique raciale de la collectivité locale et, en tant que membre de la société canadienne, elle souscrit aux principes d'égalité. Cette personne raisonnable ne conclurait pas que les actes d'un juge suscitent une crainte raisonnable de partialité sans une preuve établissant clairement qu'il a indûment fait intervenir son point de vue dans son jugement; cette exigence découle de la présomption d'impartialité du juge. La sensibilisation au contexte dans lequel l'affaire a eu lieu ne saurait prouver que le juge n'a pas abordé l'affaire en faisant preuve d'ouverture d'esprit à l'égard de toutes les parties; au contraire, elle est dans le droit fil de la plus haute tradition d'impartialité judiciaire.

(3) *Application du critère*

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Il faut lire l'intégralité des motifs prononcés oralement, et les passages attaqués doivent être interprétés à la lumière du procès en première instance, pris dans son ensemble, et compte tenu des autres passages du jugement. Ces motifs montrent que le juge du tribunal pour adolescents a examiné l'affaire avec un esprit ouvert, qu'elle s'est servie de son expérience et de sa connaissance de la collectivité pour comprendre la réalité de l'affaire, et qu'elle a appliqué la règle fondamentale de la preuve hors de tout doute raisonnable. Ses observations étaient entièrement fondées sur l'affaire qui lui était soumise. Elle les a faites après avoir pesé le témoignage contradictoire des deux témoins et en réponse aux arguments du ministère public. Ses observations étaient entièrement justifiées par la preuve produite. En dirigeant son attention vers la dynamique raciale de l'affaire, elle s'est tout simplement efforcée de rendre justice à la lumière du contexte, ce qui était tout à fait légitime et de nature à favoriser la résolution juste et équitable de l'affaire. Bien que le juge n'ait pas conclu à l'existence de racisme, il y avait des éléments de preuve sur la foi desquels elle aurait pu le faire.

The impugned comments were not unfortunate, unnecessary, or close to the line. They reflected an entirely appropriate recognition of the facts in evidence and of the context within which this case arose — a context known to the judge and to any well-informed member of the community.

Per Cory and Iacobucci JJ.: The Youth Court Judge conducted an acceptable review of all the evidence before making the impugned comments.

The generalized remarks about a history of racial tension between police officers and visible minorities were not linked by the evidence to the actions of the police officer here. They were worrisome and came very close to the line. Yet, however troubling when read individually, they were not made in isolation and must all be read in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. A reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias or that they tainted her earlier findings of credibility. The high standard for a finding of reasonable apprehension of bias was not met.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting): A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. Evidence showing propensity has been repeatedly rejected. Trial judges must base their findings on the evidence before them. Notwithstanding the opportunity to do so, no evidence was introduced showing that this police officer was racist and that racism motivated his actions or that he lied.

The Youth Court Judge's statements were not simply a review of the evidence and her reasons for judgment in which she was relying on her life experience. Even though a judge's life experience is an important ingredient in the ability to understand human behaviour, to weighing the evidence and to determining credibility, it is not a substitute for evidence. No evidence supported the conclusions that the Judge reached. Her comments fell into stereotyping the police officer. Judges, as arbiters of truth, cannot judge credibility based on irrelevant

Les observations attaquées n'étaient pas malheureuses ni inutiles et elles ne frôlaient pas la limite. Elles traduisaient une appréciation judicieuse des faits admis en preuve ainsi que du contexte dans lequel l'affaire s'est produite, ce contexte étant connu du juge ainsi que de tout membre bien informé de la collectivité.

Les juges Cory et Iacobucci: Le juge du tribunal pour adolescents a fait un examen acceptable de toute la preuve avant de faire les commentaires contestés.

Les remarques générales voulant que, historiquement, une tension raciale a pu être observée dans les rapports entre les policiers et les minorités visibles, n'étaient pas liées par un élément de preuve aux actes du policier en l'espèce. Ces remarques ont inspiré de l'inquiétude et frôlaient la limite. Néanmoins, quelque inquiétantes qu'aient été ces remarques, prises isolément, il est essentiel de noter qu'elles s'inscrivent dans un contexte. Il est indispensable de lire toutes les remarques en tenant compte du contexte de l'ensemble de la procédure et en étant conscient de toutes les circonstances que l'observateur raisonnable est censé connaître. Une personne raisonnable et renseignée, au courant de l'ensemble des circonstances, ne conclurait pas qu'elles ont suscité une crainte raisonnable de partialité ni qu'elles ont entaché les conclusions antérieures du juge sur la crédibilité. La norme rigoureuse qui permet de conclure à l'existence d'une crainte raisonnable de partialité n'a pas été respectée.

Le juge en chef Lamer et les juges Sopinka et Major (dissidents): Un procès équitable est un procès fondé sur le droit, dont le résultat est déterminé par la preuve et qui est exempt de toute partialité, réelle ou apparente. La production d'éléments de preuve visant à établir la propension a été maintes fois interdite. Le juge du procès doit fonder ses conclusions sur la preuve qui lui est présentée. L'appelant pouvait produire des éléments de preuve établissant que l'agent de police était raciste, que le racisme a motivé ses actes ou qu'il a menti, mais il ne l'a pas fait.

Les déclarations du juge du tribunal pour adolescents n'étaient pas qu'une revue de la preuve et ne constituaient pas les motifs de son jugement dans lequel elle s'est fiée à son expérience de la vie. Bien que l'expérience de la vie d'un juge soit un élément important de son aptitude à comprendre le comportement humain, à soupeser la preuve et à apprécier la crédibilité, elle ne peut se substituer à la preuve. Le juge ne disposait d'aucun élément de preuve lui permettant de tirer les conclusions qu'elle a tirées. Ses commentaires dénotaient une

witness characteristics. All witnesses must be placed on equal footing before the court.

What the Judge actually intended by the impugned statements is irrelevant conjecture. Given the concern for both the fairness and the appearance of fairness of the trial, the absence of evidence to support the judgment is an irreparable defect.

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By Cory J.

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By L'Heureux-Dubé and McLachlin JJ.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to:** *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la ma-*

opinion toute faite du policier. Le juge, à titre d'arbitre de la vérité, ne peut pas juger de la crédibilité des témoins en se fondant sur des caractéristiques sans pertinence. Tous les témoins doivent être sur un pied d'égalité devant le tribunal.

Il ne convient pas de former des conjectures sur ce que le juge du procès a vraiment voulu dire. Vu l'importance tant de l'équité du procès que de l'impression d'équité qu'il laisse, l'absence de preuves pour appuyer le jugement est un vice irréparable.

Jurisprudence

Citée par le juge Cory

Arrêt appliqué: *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **arrêts examinés:** *R. c. Parks* (1993), 15 O.R. (3d) 324, autorisation de pourvoi refusée, [1994] 1 R.C.S. x; *Pirbhai Estate c. Pirbhai*, [1987] B.C.J. No. 2685 (QL), autorisation de pourvoi refusée, [1988] 1 R.C.S. xii; *Foto c. Jones* (1974), 45 D.L.R. (3d) 43; **arrêts mentionnés:** *R. c. Wald* (1989), 47 C.C.C. (3d) 315; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631; *R. c. Curragh Inc.*, [1997] 1 R.C.S. 537; *R. c. Gushman*, [1994] O.J. No. 813 (QL); *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833; *R. c. W. (R.)*, [1992] 2 R.C.S. 122; *Huerto c. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Généreux*, [1992] 1 R.C.S. 259; *Liteky c. U.S.*, 114 S.Ct. 1147 (1994); *R. c. Bertram*, [1989] O.J. No. 2123 (QL); *R. c. Stark*, [1994] O.J. No. 406 (QL); *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. c. Elrick*, [1983] O.J. No. 515 (QL); *R. c. Lin*, [1995] B.C.J. No. 982 (QL); *R. c. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850; *Metropolitan Properties Co. c. Lannon*, [1969] 1 Q.B. 577; *R. c. Gough*, [1993] 2 W.L.R. 883; *R. c. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. Wilson* (1996), 29 O.R. (3d) 97; *R. c. Glasgow* (1996), 93 O.A.C. 67; *White c. The King*, [1947] R.C.S. 268; *Brouillard c. La Reine*, [1985] 1 R.C.S. 39; *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337; *R. c. Teskey* (1995), 167 A.R. 122.

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(iv) The Test for Finding a Reasonable Apprehension of Bias

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When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. *Idziak, supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone, supra*, at p. 636.

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It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for "appearance of justice" than for "appearance of bias". This submission cannot be sustained. The *Sussex Justices* case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.

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The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. . . ."

(iv) Le critère à appliquer en matière de crainte raisonnable de partialité

Lorsqu'on allègue la partialité du décideur, le critère à appliquer consiste à se demander si la conduite particulière suscite une crainte raisonnable de partialité. Voir arrêt *Idziak*, précité, à la p. 660. On reconnaît depuis longtemps qu'il n'est pas nécessaire d'établir l'existence de la partialité dans les faits. Il est en effet habituellement impossible de déterminer si le décideur a abordé l'affaire avec des idées réellement préconçues. Voir arrêt *Newfoundland Telephone*, précité, à la p. 636.

C'est dans ce contexte que le lord juge en chef Hewart a énoncé la célèbre maxime: [TRADUCTION] «[il] est essentiel que non seulement justice soit rendue, mais que justice paraisse manifestement et indubitablement être rendue»: *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, à la p. 259. Le ministère public a avancé que cette maxime constituait un motif distinct d'examen de la décision du juge Sparks, laissant entendre que les cours d'appel interviennent plus volontiers dans les cas où l'«impression de justice» est en jeu que dans les cas où il s'agit d'«apparence de partialité». Cet argument est mal fondé. L'affaire *Sussex Justices* concernait une allégation de partialité. L'exigence que justice paraisse être rendue signifie simplement que la personne qui allègue la partialité n'est pas tenue de prouver l'existence de cette partialité dans les faits. Le ministère public ne peut avoir gain de cause que si les motifs du juge Sparks suscitent une crainte raisonnable de partialité.

Dans ses motifs de dissidence dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394, le juge de Grandpré a exposé avec beaucoup de clarté la façon dont il convient d'appliquer le critère de la partialité:

[L]a crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. [.] [C]e critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. . . »

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty, supra*, at pp. 394-95:

I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.);

C'est ce critère qui a été adopté et appliqué au cours des deux dernières décennies. Il comporte un double élément objectif: la personne examinant l'allégation de partialité doit être raisonnable, et la crainte de partialité doit elle-même être raisonnable eu égard aux circonstances de l'affaire. Voir les décisions *Bertram*, précitée, aux pp. 54 et 55; *Gushman*, précitée, au par. 31. La personne raisonnable doit de plus être une personne bien renseignée, au courant de l'ensemble des circonstances pertinentes, y compris [TRADUCTION] «des traditions historiques d'intégrité et d'impartialité, et consciente aussi du fait que l'impartialité est l'une des obligations que les juges ont fait le serment de respecter»: *R. c. Elrick*, [1983] O.J. No. 515 (H.C.), au par. 14. Voir aussi *Stark*, précité, au par. 74; *R. c. Lin*, [1995] B.C.J. No. 982 (C.S.), au par. 34. À ceci j'ajouterais que la personne raisonnable est également censée connaître la réalité sociale sous-jacente à une affaire donnée, et être sensible par exemple à l'ampleur du racisme ou des préjugés fondés sur le sexe dans une collectivité donnée.

L'appelant a fait valoir que le critère exige que soit démontrée une «réelle probabilité» de partialité, par opposition au «simple soupçon». Cet argument paraît inutile à la lumière des justes observations du juge de Grandpré dans l'arrêt *Committee for Justice and Liberty*, précité, aux pp. 394 et 395:

Je ne vois pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité». Toutefois, les motifs de crainte doivent être sérieux et je suis complètement d'accord avec la Cour d'appel fédérale qui refuse d'admettre que le critère doit être celui d'«une personne de nature scrupuleuse ou tatillonne». [Je souligne.]

Néanmoins, la jurisprudence anglaise et canadienne appuie avec raison la prétention de l'appelant selon laquelle il faut établir une réelle probabilité de partialité car un simple soupçon est insuffisant. Voir *R. c. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. c. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. c. Gough*, [1993] 2 W.L.R. 883 (H.L.);

Bertram, supra, at p. 53; *Stark, supra*, at para. 74; *Gushman, supra*, at para. 30.

Bertram, précité, à la p. 53; *Stark, précité*, au par. 74; *Gushman, précité*, au par. 30.

¹¹³ Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark, supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

Peu importe les mots précis utilisés pour définir le critère, ses diverses formulations visent à souligner la rigueur dont il faut faire preuve pour conclure à la partialité, réelle ou apparente. C'est une conclusion qu'il faut examiner soigneusement car elle met en cause un aspect de l'intégrité judiciaire. De fait, l'allégation de crainte raisonnable de partialité met en cause non seulement l'intégrité personnelle du juge, mais celle de l'administration de la justice toute entière. Voir la décision *Stark, précitée*, aux par. 19 et 20. Lorsqu'existent des motifs raisonnables de formuler une telle allégation, les avocats ne doivent pas redouter d'agir. C'est toutefois une décision sérieuse qu'on ne doit pas prendre à la légère.

¹¹⁴ The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram, supra*, at p. 28; *Lin, supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

La charge d'établir la partialité incombe à la personne qui en allègue l'existence: *Bertram, précité*, à la p. 28; *Lin, précité*, au par. 30. De plus, la crainte raisonnable de partialité sera entièrement fonction des faits de l'espèce.

¹¹⁵ Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

Enfin, dans le contexte du présent pourvoi, il est vital de ne pas perdre de vue que le critère de la crainte raisonnable de partialité s'applique également à tous les juges, indépendamment de leur formation, leur sexe, leur race, leur origine ethnique et toute autre caractéristique. Il n'est pas plus probable que le juge noir soit prévenu en faveur des justiciables noirs que le juge blanc ne le soit en faveur des justiciables blancs. Tous les juges de toute race, couleur, religion ou origine nationale jouissent de la même présomption d'intégrité judiciaire et ont droit à l'application du même critère rigoureux dans l'examen de la partialité. De façon semblable, tous les juges sont assujettis aux mêmes obligations fondamentales d'être impartiaux et de paraître impartiaux.

(v) Judicial Integrity and the Importance of Judicial Impartiality

(v) L'intégrité de la magistrature et l'importance de son impartialité

¹¹⁶ Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the

Le serment que prononce le juge lorsqu'il entre en fonctions est souvent le moment le plus important de sa carrière. À la fierté et à la joie se mêle en ce moment le sentiment de la lourde responsabilité

TAB Q

Ronald Edward Sparrow *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The National Indian Brotherhood / Assembly of First Nations, the B.C. Wildlife Federation, the Steelhead Society of British Columbia, the Pacific Fishermen's Defence Alliance, Northern Trollers' Association, the Pacific Gillnetters' Association, the Gulf Trollers' Association, the Pacific Trollers' Association, the Prince Rupert Fishing Vessel Owners' Association, the Fishing Vessel Owners' Association of British Columbia, the Pacific Coast Fishing Vessel Owners' Guild, the Prince Rupert Fishermen's Cooperative Association, the Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., the Fisheries Council of British Columbia, the United Fishermen and Allied Workers' Union, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta and the Attorney General of Newfoundland *Interveners*

INDEXED AS: R. V. SPARROW

File No.: 20311.

1988; November 3; 1990; May 31.

Present: Dickson C.J. and McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Aboriginal rights — Fishing rights — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of the Constitution Act, 1982 — Constitution Act, 1982, ss. 35(1), 52(1) — Fisheries Act, R.S.C. 1970, c. F-14, s. 34 — British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12, 27(1), (4).

* McIntyre J. took no part in the judgment.

Ronald Edward Sparrow *Appellant*

c.

Sa Majesté la Reine *Intimée*

a

et

La Fraternité des Indiens du Canada / Assemblée des premières nations, la B.C. Wildlife Federation, la Steelhead Society of British Columbia, la Pacific Fishermen's Defence Alliance, Northern Trollers' Association, la Pacific Gillnetters' Association, la Gulf Trollers' Association, la Pacific Trollers' Association, la Prince Rupert Fishing Vessel Owners' Association, la Fishing Vessel Owners' Association of British Columbia, la Pacific Coast Fishing Vessel Owners' Guild, la Prince Rupert Fishermen's Cooperative Association, la Co-op Fishermen's Guild, Deep Sea Trawlers' Association of B.C., le Fisheries Council of British Columbia, le Syndicat des pêcheurs et travailleurs assimilés, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Colombie-Britannique, le procureur général de la Saskatchewan, le procureur général de l'Alberta et le procureur général de Terre-Neuve *Intervenants*

RÉPERTORIÉ: R. C. SPARROW

N° du greffe: 20311.

b

1988; 3 novembre; 1990; 31 mai.

Présents: Le juge en chef Dickson et les juges McIntyre*, Lamer, Wilson, La Forest, L'Heureux-Dubé et Sopinka.

c

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit constitutionnel — Droits ancestraux — Droits de pêche — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982? — Loi constitutionnelle de 1982, art. 35(1), 52(1) — Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34 — Règlement de pêche général de la Colombie-Britannique, DORS/84-248, art. 4, 12, 27(1), (4).

* Le juge McIntyre n'a pas pris part au jugement.

Indians — Aboriginal rights — Fishing rights — Interpretation — Indian convicted of fishing with net larger than permitted by Band's licence — Whether or not net length restriction inconsistent with s. 35(1) of Constitution Act, 1982.

Appellant was charged in 1984 under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Appellant was convicted. The trial judge found that an aboriginal right could not be claimed unless it was supported by a special treaty and that s. 35(1) of the *Constitution Act, 1982* accordingly had no application. An appeal to County Court was dismissed for similar reasons. The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Its decision was appealed and cross-appealed. The constitutional question before this Court queried whether the net length restriction contained in the Band's fishing licence was inconsistent with s. 35(1) of the *Constitution Act, 1982*.

Held: The appeal and cross-appeal should be dismissed. The constitutional question should be sent back to trial to be answered according to the analysis set out in these reasons.

Section 35(1) applies to rights in existence when the *Constitution Act, 1982* came into effect; it does not revive extinguished rights. An existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time.

The Crown failed to discharge its burden of proving extinguishment. An aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*. Nothing in the *Fisheries Act* or its detailed regulations demonstrated a clear and plain intention to extinguish the Indian

Indiens — Droits ancestraux — Droits de pêche — Interprétation — Indien reconnu coupable d'avoir pêché avec un filet plus long que celui autorisé par le permis de la bande — La restriction quant à la longueur du a filet est-elle incompatible avec l'art. 35(1) de la Loi constitutionnelle de 1982?

En 1984, l'appellant a été accusé, en vertu de la *Loi sur les pêcheries*, d'avoir pêché avec un filet dérivant plus long que celui autorisé par le permis de pêche de subsistance de la bande indienne à laquelle il appartenait. Il a reconnu les faits à l'origine de l'infraction, mais il a soutenu en défense qu'il exerçait un droit ancestral existant de pêcher et que la restriction imposée dans le permis de la bande quant à la longueur du filet était invalide pour cause d'incompatibilité avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

L'appellant a été déclaré coupable. Le juge de première instance a conclu qu'on ne pouvait revendiquer un droit ancestral à moins que celui-ci ne soit étayé par un traité particulier, et que le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'appliquait donc pas. Un appel devant la Cour de comté a été rejeté pour des motifs semblables. La Cour d'appel a statué que les conclusions de fait du juge de première instance étaient insuffisantes pour justifier un acquittement. Son arrêt fait l'objet d'un pourvoi et d'un pourvoi incident. La question constitutionnelle soumise à la Cour est de savoir si la restriction imposée dans le permis de pêche de la bande quant à la longueur des filets est incompatible avec le par. 35(1) de la *Loi constitutionnelle de 1982*.

Arrêt: Le pourvoi et le pourvoi incident sont rejetés. La question constitutionnelle doit être renvoyée en première instance afin de recevoir une réponse conformément à l'analyse exposée dans les présents motifs.

Le paragraphe 35(1) s'applique aux droits qui existaient au moment de l'entrée en vigueur de la *Loi constitutionnelle de 1982*; il ne vient pas rétablir des droits éteints. Un droit ancestral existant ne saurait être interprété de façon à englober la manière précise dont il était réglementé avant 1982. L'expression «droits ancestraux existants» doit recevoir une interprétation souple de manière à permettre à ces droits d'évoluer avec le temps.

Le ministère public ne s'est pas acquitté de son fardeau de prouver l'extinction du droit. Un droit ancestral n'est pas éteint du seul fait que son exercice fasse l'objet d'une réglementation très minutieuse en vertu de la *Loi sur les pêcheries*. Ni la *Loi sur les pêcheries* ni ses règlements d'application détaillés ne font état d'une

aboriginal right to fish. These fishing permits were simply a manner of controlling the fisheries, not of defining underlying rights. Historical policy on the part of the Crown can neither extinguish the existing aboriginal right without clear intention nor, in itself, delineate that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can, however, regulate the exercise of that right but such regulation must be in keeping with s. 35(1).

Section 35(1) of the *Constitution Act, 1982*, at the least, provides a solid constitutional base upon which subsequent negotiations can take place and affords aboriginal peoples constitutional protection against provincial legislative power. Its significance, however, extends beyond these fundamental effects. The approach to its interpretation is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself.

Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights. The provision is not subject to s. 1 of the *Canadian Charter of Rights and Freedoms*. Any law or regulation affecting aboriginal rights, however, will not automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Section 35(1) does not explicitly authorize the courts to assess the legitimacy of any government legislation that restricts aboriginal rights. The words "recognition and affirmation", however, incorporate the government's responsibility to act in a fiduciary capacity with respect to aboriginal peoples and so import some restraint on the exercise of sovereign power. Federal legislative powers continue, including the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*, but must be read together with s. 35(1). Federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.

intention claire et expresse de mettre fin au droit ancestral des Indiens de pêcher. Ces permis de pêche constituaient simplement une façon de contrôler les pêcheries et non de définir des droits sous-jacents. La politique historique de Sa Majesté ne permet pas d'éteindre le droit ancestral existant en l'absence d'intention claire en ce sens ni ne permet en soi de délimiter ce droit. La nature de règlements gouvernementaux ne saurait être déterminante quant au contenu et à la portée d'un droit ancestral existant. La politique gouvernementale peut toutefois réglementer l'exercice de ce droit, mais cette réglementation doit être conforme au par. 35(1).

Le paragraphe 35(1) de la *Loi constitutionnelle de 1982* procure, tout au moins, un fondement constitutionnel solide à partir duquel des négociations ultérieures peuvent être entreprises et accorde aux autochtones une protection constitutionnelle contre la compétence législative provinciale. Son importance va toutefois au-delà de ces effets fondamentaux. La méthode à adopter pour l'interpréter est dérivée des principes généraux d'interprétation constitutionnelle, des principes relatifs aux droits ancestraux et des objets sous-jacents à la disposition constitutionnelle elle-même.

Il y a lieu d'interpréter le par. 35(1) en fonction de l'objet qu'il vise. Une interprétation généreuse et libérale s'impose étant donné que cette disposition vise à confirmer les droits ancestraux. La disposition n'est pas assujettie à l'article premier de la *Charte canadienne des droits et libertés*. Cependant, toute loi ou tout règlement portant atteinte aux droits ancestraux des autochtones ne sera pas automatiquement inopérant en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*. Un texte législatif qui touche l'exercice de droits ancestraux sera valide s'il satisfait au critère applicable pour justifier une atteinte à un droit reconnu et confirmé au sens du par. 35(1).

Le paragraphe 35(1) n'autorise pas explicitement les tribunaux à apprécier la légitimité d'une mesure législative gouvernementale qui restreint des droits ancestraux. L'expression «reconnaissance et confirmation» comporte cependant la responsabilité qu'a le gouvernement d'agir en qualité de fiduciaire à l'égard des peuples autochtones et implique ainsi une certaine restriction à l'exercice du pouvoir souverain. Les pouvoirs législatifs fédéraux subsistent, y compris le droit de légiférer relativement aux Indiens en vertu du par. 91(24) de la *Loi constitutionnelle de 1867*, mais ces pouvoirs doivent être rapprochés du par. 35(1). Le pouvoir fédéral doit être concilié avec l'obligation fédérale et la meilleure façon d'y parvenir est d'exiger la justification de tout règlement gouvernemental qui porte atteinte à des droits ancestraux.

The test for justification requires that a legislative objective must be attained in such a way as to uphold the honour of the Crown and be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation. Section 35(1) does not promise immunity from government regulation in contemporary society but it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. The inquiry begins with a reference to the characteristics or incidents of the right at stake. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the "*sui generis*" nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.

To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. Is the limitation unreasonable? Does the regulation impose undue hardship? Does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

Here, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the exercise of the natives' right to fish for food. The issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right.

Le critère de la justification exige qu'un objectif législatif soit réalisé d'une manière qui préserve l'honneur de Sa Majesté et qui soit conforme aux rapports contemporains uniques, fondés sur l'histoire et les politiques, qui existent actuellement entre la Couronne et les peuples autochtones du Canada. La mesure dans laquelle une loi ou un règlement a un effet sur un droit ancestral existant doit être examinée soigneusement de manière à assurer la reconnaissance et la confirmation de ce droit. Le paragraphe 35(1) ne constitue pas une promesse d'immunité contre la réglementation gouvernementale dans la société contemporaine, mais il représente un engagement important de la part de la Couronne. En effet, le gouvernement se voit imposer l'obligation de justifier toute mesure législative qui a un effet préjudiciable sur un droit ancestral protégé par le par. 35(1).

La première question à poser est de savoir si la loi en question a pour effet de porter atteinte à un droit ancestral existant. L'analyse commence par un examen des caractéristiques ou des attributs du droit en question. Les droits de pêche ne sont pas des droits de propriété au sens traditionnel. Il s'agit de droits qui appartiennent à un groupe et qui sont en harmonie avec la culture et le mode de vie de ce groupe. Les tribunaux doivent prendre soin d'éviter d'appliquer les concepts traditionnels de propriété propres à la common law en tentant de saisir la nature "*sui generis*" des droits ancestraux. S'il est impossible de donner une définition simple des droits de pêche, il est crucial de se montrer ouvert au point de vue des autochtones eux-mêmes quant à la nature des droits en cause.

Pour déterminer si les droits de pêche ont subi une atteinte constituant une violation à première vue du par. 35(1), on doit poser certaines questions. La restriction est-elle déraisonnable? Le règlement est-il indûment rigoureux? Le règlement refuse-t-il aux titulaires du droit le recours à leur moyen préféré de l'exercer? C'est au particulier ou au groupe qui conteste la mesure législative qu'il incombe de prouver qu'il y a eu violation à première vue.

En l'espèce, le règlement serait jugé constituer une atteinte à première vue si on concluait qu'il impose une restriction néfaste à l'exercice par les autochtones de leur droit de pêcher à des fins de subsistance. La question en litige n'exige pas simplement qu'on examine si la prise autorisée de poissons a été réduite au-dessous de ce qui est requis pour subvenir aux besoins alimentaires et rituels raisonnables. Le critère nécessite plutôt qu'on se demande si, de par son objet ou son effet, la restriction imposée quant à la longueur des filets porte atteinte inutilement aux intérêts protégés par le droit de pêche.

If a *prima facie* interference is found, the analysis moves to the issue of justification. This test involves two steps. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. The "public interest" justification is so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights. The justification of conservation and resource management, however, is uncontroversial.

If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue: the honour of the Crown in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginal people must be the first consideration in determining whether the legislation or action in question can be justified. There must be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others given the limited nature of the resource.

Guidelines are necessary to resolve the allocational problems that arise regarding the fisheries. Any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. Section 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority and guarantees that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include: whether there has

Si on conclut à l'existence d'une atteinte à première vue, l'analyse porte ensuite sur la question de la justification. Ce critère comporte deux étapes. En premier lieu, il faut se demander s'il existe un objectif législatif régulier. À ce stade, la cour se demanderait si l'objectif visé par le Parlement en autorisant le ministère à adopter des règlements en matière de pêche est régulier. Serait également examiné l'objectif poursuivi par le ministère en adoptant le règlement en cause. La justification fondée sur «l'intérêt public» est si vague qu'elle ne fournit aucune ligne directrice utile et si large qu'elle est inutilisable comme critère applicable pour déterminer si une restriction imposée à des droits constitutionnels est justifiée. La justification de la conservation et de la gestion des ressources ne soulève cependant aucune controverse.

Si on conclut à l'existence d'un objectif législatif régulier, on passe au second volet de la question de la justification: l'honneur de Sa Majesté lorsqu'Elle transige avec les peuples autochtones. Les rapports spéciaux de fiduciaire et la responsabilité du gouvernement envers les autochtones doivent être le premier facteur à examiner en déterminant si la mesure législative ou l'action en cause est justifiable. Il doit y avoir un lien entre la question de la justification et l'établissement de priorités dans le domaine de la pêche. La reconnaissance et la confirmation des droits ancestraux, prévues dans la Constitution, peuvent donner lieu à des conflits avec les intérêts d'autrui étant donné la nature limitée de la ressource.

On a besoin de lignes directrices qui permettront de résoudre les problèmes de répartition de ressources qui surgissent dans le domaine des pêcheries. Dans l'établissement des priorités suite à la mise en œuvre de mesures de conservation valides, il faut accorder la priorité absolue à la pêche par les Indiens à des fins de subsistance.

La norme de justification à respecter est susceptible d'imposer un lourd fardeau à Sa Majesté. Toutefois, la politique gouvernementale relativement à la pêche en Colombie-Britannique commande déjà, et ce, indépendamment du par. 35(1), que, dans l'attribution du droit de prendre du poisson, le droit des Indiens de pêcher à des fins d'alimentation ait la priorité sur les intérêts d'autres groupes d'utilisateurs. Le paragraphe 35(1) exige que Sa Majesté assure que Ses règlements respectent cette attribution de priorité et garantit que les plans de conservation et de gestion réservent aux peuples autochtones un traitement qui assure que leurs droits sont pris au sérieux.

Il y a, dans l'analyse de la justification, d'autres questions à aborder selon les circonstances de l'enquête. Il s'agit notamment des questions de savoir si, en tentant

been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. This list is not exhaustive.

Cases Cited

Applied: *Jack v. The Queen*, [1980] 1 S.C.R. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **considered:** *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (Sask. C.A.), aff'd (1983), 7 C.C.C. (3d) 443 (Sask. Q.B.); **distinguished:** *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (S.C.C.); **referred to:** *Calder v. Attorney General of British Columbia* (1970), 74 W.W.R. 481 (B.C.C.A.), aff'd [1973] S.C.R. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (Alta. Q.B.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (N.B.Q.B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.); *Baker Lake (Hamlet) v. Minister of Indian Affairs and Northern Development*, [1980] 1 F.C. 518 (T.D.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] S.C.R. 81; *R. v. Sutherland*, [1980] 2 S.C.R. 451; *Simon v. The Queen*, [1985] 2 S.C.R. 387; *Johnson v. McIntosh* (1823), 8 Wheaton 543 (U.S.S.C.); *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (B.C.S.C.); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Kruger v. The Queen*, [1978] 1 S.C.R. 104.

Statutes and Regulations Cited

British Columbia Fishery (General) Regulations, SOR/84-248, ss. 4, 12(1), (2), 27(1), (4).
British Columbia Terms of Union, R.S.C., 1985, App. II, No. 10, art. 13.
Canadian Charter of Rights and Freedoms, ss. 1, 33.
Constitution Act, 1867, ss. 91(12), (24), 109.
Constitution Act, 1930.
Constitution Act, 1982, ss. 35(1), 52(1).
Fisheries Act, R.S.C. 1970, c. F-14, ss. 34, 61(1).
Quebec Boundaries Extension Act, 1912, S.C. 1912, c. 45.

d'obtenir le résultat souhaité, on a porté le moins possible atteinte à des droits, si une juste indemnisation est prévue en cas d'expropriation et si le groupe d'autochtones en question a été consulté au sujet des mesures de conservation mises en œuvre. Cette énumération n'est pas exhaustive.

Jurisprudence

Arrêts appliqués: *Jack c. La Reine*, [1980] 1 R.C.S. 294; *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700; *Nowegijick c. La Reine*, [1983] 1 R.C.S. 29; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360; **arrêts examinés:** *R. v. Denny* (1990), 55 C.C.C. (3d) 322; *R. v. Hare and Debassige* (1985), 20 C.C.C. (3d) 1 (C.A. Ont.); *R. v. Eninew, R. v. Bear* (1984), 12 C.C.C. (3d) 365 (C.A. Sask.), conf. (1983), 7 C.C.C. (3d) 443 (B.R. Sask.); **distinction d'avec l'arrêt:** *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159 (C.S.C.); **arrêts mentionnés:** *Calder v. Attorney-General of British Columbia* (1970), 74 W.W.R. 481 (C.A.C.-B.), conf. [1973] R.C.S. 313; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.); *Re Steinhauer and The Queen* (1985), 15 C.R.R. 175 (B.R. Alb.); *Martin v. The Queen* (1985), 17 C.R.R. 375 (B.R.N.-B.); *R. v. Agawa* (1988), 28 O.A.C. 201; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (C.P.); *Baker Lake (Hamlet) c. Ministre des Affaires indiennes et du Nord canadien*, [1980] 1 C.F. 518 (D.P.I.); *R. v. Wesley*, [1932] 2 W.W.R. 337; *Prince and Myron v. The Queen*, [1964] R.C.S. 81; *R. c. Sutherland*, [1980] 2 R.C.S. 451; *Simon c. La Reine*, [1985] 2 R.C.S. 387; *Johnson v. McIntosh* (1823), 8 Wheaton 543 (S.C.É.-U.); *Canadien Pacifique Ltée c. Paul*, [1988] 2 R.C.S. 654; *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 (C.S.C.-B.); *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Kruger c. La Reine*, [1978] 1 R.C.S. 104.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 33.
Conditions de l'adhésion de la Colombie-Britannique, L.R.C. (1985), app. II, n° 10, art. 13.
Loi constitutionnelle de 1867, art. 91(12), (24), 109.
Loi constitutionnelle de 1930.
Loi constitutionnelle de 1982, art. 35(1), 52(1).
Loi de l'extension des frontières de Québec, 1912, S.C. 1912, ch. 45.
Loi sur les pêcheries, S.R.C. 1970, ch. F-14, art. 34, 61(1).
Proclamation royale de 1763, L.R.C. (1985), app. II, n° 1.

TAB R

Case Name:
St. Lewis v. Rancourt

Between
Joanne St. Lewis, Plaintiff/Responding Party, and
Denis Rancourt, Defendant/Moving Party

[2012] O.J. No. 6426

2012 ONSC 4494

Court File No. 11-51657

Ontario Superior Court of Justice

R. Beaudoin J.

Heard: June 20, 2012.
Judgment: August 2, 2012.

(40 paras.)

Counsel:

Richard Dearden for the Plaintiff/Responding Party.

Peter Doody for the University of Ottawa.

Denis Rancourt, Self-Represented

REASONS FOR DECISION ON MOTION

1 R. BEAUDOIN J.:-- In accordance with my case management order of May 4, 2012, the Defendant brought a motion to address refusals arising from the cross-examinations on the affidavits filed in response to his Champerty Motion and arising from his summons to a witness. I had previously determined that the University of Ottawa was a necessary party to the Champerty Motion.

Background

2 The Plaintiff, Professor Joanne St. Lewis, is a tenured Assistant Professor at the Faculty of Law of the University of Ottawa. Her professional accomplishments and achievements in the area

19 Mr. Roussy says he has reviewed all documents which were discovered as a result of that search. He notes that some e-mails were sent to the Defendant but that the remainder are covered by solicitor-client privilege.

20 In an Affidavit sworn and filed June 19, 2012 and in support of the request to cross-examine Mr. Roussy, the Defendant alleges that he received new information from one Joseph Hickey on June 18, 2012 that revealed a document not previously disclosed: namely an e-mail between Stéphane Émard-Chabot to Allan Rock dated September 1, 2011. This document was disclosed to Mr. Hickey as a result of an access to information request made by him. The Defendant says he obtained this document by downloading it from Mr. Hickey's blog. This document is identified as record "348". Dr. Rancourt then goes so far as to accuse Mr. Roussy of perjury at paragraph 2 of his Reasons to cross-examine Mr. Alain Roussy.

21 I agree with the University that there is no contradiction, let alone any perjury, on the part of Mr. Roussy. The e-mail in question is between Mr. Stéphane Émard-Chabot and Mr. Rock and it predates the time period set out in the Notice of Examination. It is an e-mail that refers to retaining Mr. Scott. This is no basis for any adjournment of a motion dealing with over 147 refusals.

22 More importantly, the Defendant's claim of last minute discovery of this e-mail on June 18, 2011 is questionable. I have been provided with a copy of his May 1, 2012 blog wherein he cites Mr. Hickey's blog and the results of his request for copies for all of the e-mails between Allan Rock and Stéphane Émard-Chabot. The Defendant does not deny the authenticity of this blog, nor the fact that he could have accessed all of these documents earlier, at least as early as May 1, 2012.

23 Finally, if Dr. Rancourt had wanted the claim of privilege to be reviewed he could have asked the court to do so but that is not what he has done. The Defendant seems to feel he has a right to cross-examine anyone who has filed an Affidavit. Rule 39.03(1) is permissive. There is no basis to cross-examine Mr. Roussy.

The Admissibility of The Defendant's Expert Report

24 The Defendant wishes to rely on the Affidavit of Louis Béliveau to provide an expert opinion on electronic communications. Mr. Béliveau has a Bachelor of Engineering Degree as well as an LL.B. and B.C.L. from McGill University. While The Defendant's Motion Record does not clearly spell out the basis for Mr. Béliveau's opinion, it appears that he relies on this as evidence of incomplete production of documents.

25 Mr. Béliveau's report is inadmissible as there is no compliance with Rule 53 (Duty of an Expert). More importantly, it does not comply with the common law requirements of relevance and necessity as set in *R. v. Mohan*, [1994] 2 S.C.R. 9. The report refers to a series of e-mails that discuss a meeting to be held on April 15, 2011 between Allan Rock, Joanne St. Lewis and Bruce Feldthusen to discuss the defamation action. Mr. Dearden, as Professor St. Lewis' counsel, asked her to print copies of this e-mail correspondence. As a result there is an e-mail that appears to be from Allan Rock to Richard Dearden dated March 30, 2012, apparently scheduling a meeting nearly 11 months earlier.

26 The Defendant's motion materials suggest that this e-mail is more evidence of documents that have not been disclosed. Even assuming that this is the case, this is not an issue that requires an expert opinion. Dr. Rancourt could ask Mr. Rock questions about the e-mail. It was explained to the Court that the March, 2012 date was the result of the functionality of the Microsoft Outlook soft-

Third, the extent to which the court can compel undertakings to be given on a cross-examination is less clear. If the deponent confines his or her evidence to personal knowledge, there is no apparent basis to compel him or her to obtain information about what others know about the case. For an application, the information would be hearsay and not admissible for contentious matters. Moreover, compelling the evidence raises concerns that the adversarial system has been replaced by an inquisitorial system.

Fourth, if a deponent does provide information based on information and belief, there would appear to be a basis to compel him or her to give undertakings, at least with respect to that information.

37 I agree with the Counsel for the University's argument that deponents of affidavits based on their own knowledge and not given on "information and belief" ought not to be required to give undertakings or ask others information. This would entitle a person to obtain what amounts to an additional examination for discovery. This reasoning applies with greater force where someone is being examined pursuant to a Summons to Witness under rule 39.02. Our *Rules of Civil Procedure* place clear limits on the right to discovery of a non-party.

Refusals on Examination of Robert Giroux

38 Mr. Giroux, Chair of the Board of Governors of the University of Ottawa, was examined pursuant to a Summons to Witness:

No. 2: University liability policies
QQ. 11-12, pp. 5-6

Ruling: Answered; there is no policy that covers this situation: in any event, not relevant.

No. 3: University policies for funding legal costs: QQ. 13-22, pp. 6-8

Ruling: Answered; moreover witness not required to give an undertaking.
Answered by another witness.

No. 4: University Budget for outside legal fees in a
typical year
Q. 37, p. 12

Ruling: Not relevant

No. 5 Witness to search e-mail accounts
 QQ. 124-135, pp. 33-36;

Ruling: Answered; it was a telephone communication. Otherwise, questions
 not relevant or too vague. Witness has no obligation to give under-
 takings.

No. 6: Relevant Communications
 QQ. 136-154, pp. 36-42

Ruling: Answered; it was a telephone communication. A search was under-
 taken. No reason to conduct an e-mail search; this is a fishing expe-
 dition.

No. 7: Information about agenda for October 19, 2011 QQ. 188-194, pp.
 48-49

Ruling: Witness answered. Who was at the meeting is not relevant.

No. 8: Witness's reaction to University sharing the
 proceeds
 Q. 244, pp. 58-59

Ruling: Mr. Giroux's reaction is not relevant nor is his opinion on the con-
 flict with any University policy.

No. 9: Expected cost of the litigation
 Q. 273, pp 64-65

Ruling: Not relevant; cases cited by the Defendant are not applicable; class
 action cases.

No. 10: Reasons why the litigation is important
QQ. 286-287, p. 67-68

Ruling: Not relevant

No. 11: Cap on the amount to fund litigation
Q. 341, pp. 79-80

Ruling: Cap on funding is not relevant.

No. 12: Financial impact of the Agreement
QQ. 348-351, pp. 80-81

Ruling: Not relevant. Pure speculation on the part of the Defendant

No. 13 University policy limiting discretionary
funding
QQ. 357, 359, 360, p. 83

Ruling: Not relevant. To the extent that the question was at all relevant, it
was answered.

No requirement of a witness to give an undertaking.

No. 14: Quantum that triggers control on capital
expenditures
Q. 362, pp. 83-84

Ruling: Not relevant.

No. 15: University policy about surveillance

Q. 381, p. 87

Ruling: Not relevant to the matters raised in the Notice of Motion. Dr. Rancourt was aware of surveillance of himself in 2008 before Mr. Rock became President, moreover, this is being litigated in the labour arbitration.

No. 16: Acceptable practices of surveillance
QQ. 383-393, pp. 88-91

Ruling: Not relevant

No. 17: University policy about obtaining/using medical information
Q. 416, p. 96

Ruling: Not relevant

No. 18: Acceptable practice of third party psychiatric evaluations
QQ. 421-426, pp. 98-100

Ruling: Not relevant

No. 1: Request for documents as set out in the Summons to Witness
Q. 8-9, pp. 3-4 (as per the chart)

Ruling: The only relevant documents are those that relate to the decision to fund Professor St. Lewis' costs and these have been produced. Any other documents requested are not relevant to the issues raised in the Champerty motion. Furthermore, Mr. Giroux is the Chair of the Board of Governors. He does not have personal possession, control

or power over all documents within the control of the University. This witness does not have to give an undertaking. This has been addressed by the witness earlier. Question relates to credibility only.

Cross-Examination of Alan Rock

Ruling: The Defendant did not pursue Items 1-10 as a result of earlier rulings.

No. 11: Common Motives for dismissal and maintenance QQ. 508, 510, 511, 513, 515, 517, 518, 520, 525, pp. 102-106

Ruling: Not Relevant to the issues pleaded in the Notice of Motion or supporting affidavit. Mr. Rancourt refers to documents that he will need leave to produce at the Champerty Motion; he can't introduce them now. The dismissal is not being tried in this forum.

Nos. 12, 13

Ruling: Not pursued as result of earlier rulings.

39 From Notice of Examination:

Item 5: All documents relevant to his litigation

Ruling: Seven relevant documents were produced. Remaining documents sought are not relevant or are covered by solicitor client privilege. Request is too broad. This is not a motion for a better affidavit of documents.

Cross-examination of Céline Delorme

40 From Notice of Examination:

Nos. 1 and 2:

Ruling: Not pursued in the light of previous rulings

No. 3: Credibility of Exhibit "A"
QQ. 65, 67, 70, 71, 72, 133, 134, 138, pp
19-25, 48-53

Ruling: Exhibit "A" is the document that was filed in the arbitration. There is
no contradiction. Not relevant to the Champerty Motion.

R. BEAUDOIN J.

cp/e/qljel/qlpmg

1 *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 at para. 10
(S.C.J.) (Master Beaudoin); *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 at para.
14 (S.C.J.) (Master Macleod).

2 *Caputo, supra*, at para. 14.

3 *Elfe Juvenile Products Inc. v. Bern*, [1994] O.J. No. 2840 (O.C.G.D. Div. Ct.) at para. 21.

TAB S

CITATION: St. Lewis v. Rancourt, 2013 ONSC 49
COURT FILE NO.: 11-51657
DATE: 2013/01/02

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Joanne St. Lewis

Plaintiff

– and –

Denis Rancourt

Defendant

University of Ottawa

Rule 37 Affected Participant

Richard G. Dearden and Anastasia
Semenova, for the Plaintiff

Denis Rancourt, self-represented

Peter K. Doody, for the University of Ottawa

HEARD: November 15, 2012

AMENDED REASONS FOR DECISION

ANNIS J.

This is an amendment to the Reasons for Decision released November 29, 2012. The amendments occur in paragraph [12] whereby the name "Mr. Rock" is changed to "Professor St. Lewis"; in paragraphs [23](1) and [27] whereby the date of the decision of Smith J. is changed from June 27, 2012 to July 27, 2012; and on page 8 where the heading "The University Witnesses Refusals Motion" is amended to read "The Plaintiff's Witnesses Refusals Motion".

Introduction

[1] This is yet another series of motions in a series of interlocutory motions brought by the defendant, on this occasion seeking leave to appeal three interlocutory decisions of Beaudoin J. and R. Smith J.

bias of one of the Court's judges be considered, at least for the purpose of deciding whether to grant leave to appeal.

[33] It is not clear on the evidence that the defendant was out of time for seeking leave to appeal Smith J.'s letter refusing to schedule his motion.

Leave to Appeal an Interlocutory Order

[34] Leave to appeal to the Divisional Court may only be granted pursuant to Rule 62.02(4) of the *Rules of Civil Procedure* on the following grounds:

- (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
- (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

[35] The test for granting leave to appeal from an interlocutory order is an onerous one. The first ground for obtaining leave to appeal requires the defendant to demonstrate that "conflicting decisions" present a difference in the principle chosen as a guide to the exercise of judicial discretion and not merely in outcome as a result of the exercise of discretion. See *Bell ExpressVu Limited Partnership v. Morgan* (2008), 67 C.P.C. (6th) 263 (Div. Ct.) at para. 1 and *Brownhall v. Canada (Ministry of National Defence)*, (2006) 80 O.R. (3d) 91 (Sup. Ct.) at para. 27.

[36] The second ground for obtaining leave to appeal requires the defendant to convince the court that there is a good reason to doubt the correctness of the judge's decision and proposed appeal involves matters of such importance of leave should be granted. The court should ask itself whether the decision is open to "very serious debate" and, if so, whether the decision warrants resolution by a higher level of judicial authority. See *Brownhall*, *supra*, at para. 30.

Reasonable Apprehension of Bias

[37] The test to be applied for determining whether there exists a reasonable apprehension of bias has been formulated by the Ontario Court of Appeal in *Bailey v. Barbour*, 2012 ONCA 325, 110 O.R. (3d) 161 at para. 16 as follows:

...what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through conclude. Would he or she think it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

[38] Determining whether a reasonable apprehension of bias arises requires a highly fact-specific inquiry. The test is an objective one. The record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated

occurrences from the perspective of a reasonable observer throughout the trial. Moreover, isolated expressions of impatience or annoyance by a trial judge as a result of frustrations do not of themselves create unfairness. See *Lloyd v. Bush*, 2012 ONCA 349, 110 O.R. (3d) 781 at paras. 25-26.

[39] There is a strong presumption in favour of the impartiality of the trier of fact. Where a party seeks the recusal or disqualification of a judge, allegations of judicial bias will have to overcome the strong presumption of judicial impartiality. See *Bailey v. Barbour*, *supra*, at para. 19.

Analysis

[40] This is not a case that could possibly give rise to a reasonable apprehension of bias on the part of Beaudoin J. There are no interventions or declarations by him that could lend themselves to a concern of partiality. He is not personally involved in any of the circumstances of the case. There is nothing the defendant could point to in Beaudoin J.'s conduct which could begin to suggest that he somehow favoured the University.

[41] Moreover, the University is a large quasi-governmental institution in our community. Being multifaceted, ubiquitous and amorphous, it is anonymous and thus does not permit a suggestion that a judge by setting up a memorial scholarship in the name of his departed son could give rise to an apprehension that the judge might be favourably disposed to the University in litigation brought before him or her.

[42] The University was merely the means whereby Beaudoin J. could obtain some solemnity from the untimely death of his son in establishing a scholarship for others who wished to study at the University. Actions of this nature intended to benefit Society, even if taken to memorialize a close relation, are not the type of conduct that consciously or unconsciously could suggest a judge cannot act fairly.

[43] Similarly, no reasonable apprehension of a favourable consideration by Beaudoin J. towards the University could possibly arise by the University being represented by a law firm that had named one of its meeting rooms in memory of his son where he was working at the time of his premature demise.

[44] It is unreasonable to suggest that the mere act of respect by a law firm towards one of its associates who was the son of a judge and whose untimely death touched the firm could indirectly cause the judge to be biased in favour of the law firm's clients. Were this to be the case, Beaudoin J. could not hear any case pleaded by Borden Ladner Gervais LLP. This is an untenable proposition that fails to recognize that lawyers are officers of the court who are required to advance their clients' interests without adopting them as their own.

[45] The defendant's motion for leave to appeal the decision of Beaudoin J.'s decision of June 20, 2012 is dismissed with costs to the University.

The Letter 'Decision' of Justice Smith

[46] The plaintiff contends that the letter of Smith J. was not a decision: he was merely informing the defendant that his proposed motion was in the wrong court and therefore would not be scheduled to proceed.

[47] I cannot see any problem with a Case Management Judge refusing to set down a motion entirely void of merit, such as occurred here when the defendant's request was to set aside the decision of a fellow Superior Court judge on grounds of apprehension of bias.

[48] Nevertheless, whether the form is one by letter indicating immediate rejection of the motion or the refusal to set it down, substantively the results are the same, i.e. a decision rejecting the defendant's motion. As such, the defendant is entitled to seek leave to appeal the decision not to schedule his motion.

[49] This said however, leave is refused because the defendant seeks by his motion to set aside the interlocutory decision of Beaudoin J. of June 20, 2012 on grounds of reasonable apprehension of bias: a remedy which only the Divisional Court can consider.

[50] In addition, having decided that there is no possibility of success on a claim of reasonable apprehension of bias by Beaudoin J., leave to appeal this decision would serve no purpose if granted.

[51] Accordingly, it is dismissed with costs to the University.

The Plaintiff's Witnesses Refusal Motion

[52] As it is clear that no judge could conclude that the proposed appeal involves matters of any importance or that it would be desirable to grant leave, the defendant's motion for leave to appeal the order of Smith J.'s decision of September 6, 2012 is dismissed with costs to the plaintiff.

[53] For the record, I also conclude that there is no reason to doubt the correctness of the orders of Smith J., and in particular, I reject the defendant's main submission that although the applicable legal principles were properly stated, he misapplied them to the facts.

Costs

[54] The plaintiff and the University may file submissions on costs not to exceed three (3) pages in addition to a costs outline within ten (10) days of the release of these reasons. The defendant may respond within ten (10) days with submissions limited to three (3) pages.

Mr. Justice Peter Annis

2013 QM50 451 (CanLI)

TAB T

COURT OF APPEAL FOR ONTARIO

CITATION: St. Lewis v. Rancourt, 2013 ONCA 701

DATE: 20131115

DOCKET: C56905

Hoy A.C.J.O., Sharpe and Blair JJ.A.

BETWEEN

Joanne St. Lewis

Plaintiff (Respondent)

and

Denis Rancourt

Defendant (Appellant)

Denis Rancourt, appearing in person

Richard Dearden, for the plaintiff (respondent) Joanne St. Lewis

Peter Doody, for the University of Ottawa

Heard: November 8, 2013

On appeal from the order of Justice Robert J. Smith of the Superior Court of Justice, dated March 13, 2013.

APPEAL BOOK ENDORSEMENT

[1] The appellant appeals the March 13, 2013 order of Smith J., dismissing the appellant's motion to stay or dismiss the respondent, Joanne St. Lewis'

defamation order against him on the basis that it was the product of maintenance and champerty. We are not persuaded that any of the several grounds he advances has merit. We see no error of law on the part of the motion judge in concluding on the ample evidence before him that the respondent's employer's decision to fund the litigation did not amount to maintenance or champerty. Nor did the respondent's unilateral decision to donate a portion of any punitive damages she might receive to a scholarship at the employer university make out maintenance or champerty. Moreover, the underlying findings of fact made by the motion judge were reasonably supported by the record.

[2] As to the appellant's bias or appearance of bias submission, it in our view has no merit. It was fully considered by Annis J. and rejected. We agree with that decision and, in any event, that decision is not open to challenge in this court.

[3] The appellant also argued in his factum that the motion judge had not given him adequate time to make his submissions. We reject this argument. The time allocated was clearly announced and reasonable.

[4] This appeal is accordingly dismissed. The appellant shall pay the respondent, Ms. St. Lewis, costs in the amount of \$20,000, all inclusive, and pay the respondent university costs in the amount of \$15,000, all inclusive.

TAB U

Case Name:

St. Lewis v. Rancourt

Between

**Joanne St. Lewis, Plaintiff, and
Denis Rancourt, Defendant,
University of Ottawa, Rule 37 Affected Party**

[2013] O.J. No. 1187

2013 ONSC 1564

Court File No. 11-51657

Ontario Superior Court of Justice

R.J. Smith J.

Heard: December 13, 2012.

Judgment: March 13, 2013.

(106 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Frivolous, vexatious or abuse of process -- Stay of action -- Application by defendant to stay or dismiss action as abuse of process dismissed -- Parties were professors at same university and after defendant made comments about plaintiff on his blog, plaintiff commenced defamation action -- University agreed to pay plaintiff's legal costs as defendant's comments related to report plaintiff prepared as University employee at University's request -- There was no champerty or maintenance -- University's agreement to fund action was not officious intermeddling in litigation because plaintiff decided to sue before University agreed to fund legal fees -- University had legitimate reason for assisting plaintiff -- No agreement to share proceeds of litigation.

Legal profession -- Regulation of profession -- Champerty and maintenance -- Application by defendant to stay or dismiss action as abuse of process dismissed -- Parties were professors at same university and after defendant made comments about plaintiff on his blog, plaintiff commenced defamation action -- University agreed to pay plaintiff's legal costs as defendant's comments related to report plaintiff prepared as University employee at University's request -- There was no champerty or maintenance -- University's agreement to fund action was not officious intermeddling in

litigation because plaintiff decided to sue before University agreed to fund legal fees -- University had legitimate reason for assisting plaintiff -- No agreement to share proceeds of litigation.

Professional responsibility -- Self-governing professions -- Professions -- Legal -- Application by defendant to stay or dismiss action as abuse of process dismissed -- Parties were professors at same university and after defendant made comments about plaintiff on his blog, plaintiff commenced defamation action -- University agreed to pay plaintiff's legal costs as defendant's comments related to report plaintiff prepared as University employee at University's request -- There was no champerty or maintenance -- University's agreement to fund action was not officious intermeddling in litigation because plaintiff decided to sue before University agreed to fund legal fees -- University had legitimate reason for assisting plaintiff -- No agreement to share proceeds of litigation.

Tort law -- Abuse of legal procedure or process -- Maintenance and champerty -- Application by defendant to stay or dismiss action as abuse of process dismissed -- Parties were professors at same university and after defendant made comments about plaintiff on his blog, plaintiff commenced defamation action -- University agreed to pay plaintiff's legal costs as defendant's comments related to report plaintiff prepared as University employee at University's request -- There was no champerty or maintenance -- University's agreement to fund action was not officious intermeddling in litigation because plaintiff decided to sue before University agreed to fund legal fees -- University had legitimate reason for assisting plaintiff -- No agreement to share proceeds of litigation.

Application by the defendant for an order dismissing or staying the plaintiff's action against him as an abuse of process. The defendant was a former physics professor at the University of Ottawa. The plaintiff, a black woman, was an assistant law professor employed by the University who taught in the area of equality rights and had a reputation in anti-racism. In 2008, the plaintiff was asked by the University president to prepare an evaluation of the University Student Appeal Centre's report that had alleged systemic racism at the University. The plaintiff concluded that there was no systemic racism at the University and that the University's academic fraud process was well founded. In 2011, the plaintiff became aware that the defendant had published a blog in which he referred to the plaintiff as the University president's house negro. She advised the University that she would be suing the defendant for libel. As the defendant's allegedly defamatory blog comments were related to the report the plaintiff prepared as an employee of the University and at the University's request, the University agreed to pay for the costs of the plaintiff's legal action. The defendant brought an application to have the plaintiff's action stayed or dismissed as an abuse of process because the University's agreement to pay the plaintiff's legal costs constituted champerty and maintenance. The defendant now sought to have the issue of champerty and maintenance decided at trial or by a trial of an issue.

HELD: Application dismissed. There was no material conflict in the evidence which required a trial of an issue. Furthermore, the defendant's request to convert his motion into a trial of an issue would create unnecessary expense and delay and was not necessary to secure a just result. The University's agreement to fund the plaintiff's defamation action did not constitute officious intermeddling in litigation as the plaintiff had decided to sue the defendant for libel to protect her reputation before the University agreed to fund her legal fees. There was no maintenance as the University's reason for assisting the plaintiff by paying her legal fees, to defend her reputation which was attacked during the course of her employment, was legitimate. There was no champerty as there was no agreement

between the University and the plaintiff to share in the proceeds of the libel action. The University's agreement to fund the plaintiff's action did not constitute trafficking in litigation because the plaintiff had already decided to sue to protect her reputation and there was no evidence of the University buying or selling rights to litigation as it did not even have an agreement to share in the proceeds of the action.

Statutes, Regulations and Rules Cited:

An Act respecting Champerty, R.S.O. 1897, c. 327,

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 1.04, Rule 21.01(3), Rule 21.01(3)(d), Rule 37.07(1), Rule 39.02(2), Rule 37.13(2), Rule 37.13(2)(b), Rule 37.13(3)

Counsel:

Richard G. Dearden/Anastasia Semenova, for the Plaintiff.

Denis Rancourt, self-represented.

Peter K. Doody, for the University of Ottawa.

REASONS FOR DECISION ON THE CHAMPERTY MOTION

R.J. SMITH J.:--

Overview

1 Denis Rancourt ("Rancourt") seeks an order dismissing or staying Joanne St. Lewis' ("St. Lewis") defamation action against him as an abuse of process, because he alleges that the University of Ottawa's agreement to pay her legal costs constitutes champerty and maintenance.

2 The defendant Rancourt is a former Physics Professor at the University of Ottawa (the "University"). He published a blog on February 11, 2011 in which he referred to St. Lewis as "Allan Rock's house negro".

3 St. Lewis is an Assistant Law Professor employed by the University who teaches in the area of equality rights, and has a reputation in anti-racism. She became a tenured professor in 2001. She is also a Black woman.

4 In the fall of 2008, St. Lewis was asked by President Rock to prepare an evaluation of the University Student Appeal Centre's report that had alleged systemic racism at the University. In her report, St. Lewis concluded that there was no systemic racism at the University and that the University's academic fraud process was well founded.

5 In April 2011, shortly after St. Lewis became aware of Rancourt's blog referring to her as "Allan Rock's house negro", she met with Dean Feldthusen to advise him that she had to sue Rancourt for libel. St. Lewis and Dean Feldthusen then met with University President Allan Rock to request that the University pay for her legal costs for her libel action against Rancourt. President Rock agreed to pay St. Lewis' legal costs because the allegedly defamatory comments in Rancourt's

abuse of process" was irrelevant and inadmissible on his champerty motion. As a result of his finding, this issue has been decided by Beaudoin J. and therefore, I find that there is no material conflict in the evidence which requires a trial of an issue.

73 Even if the affidavits of April 23rd and May 23, 2012 were admitted, I conclude that there is no conflict in the material evidence related to the plaintiff's motive for commencing litigation against Rancourt. The plaintiff's uncontradicted evidence is that she decided to commence action against Rancourt to protect her reputation and that decision was not made by the University.

74 With regards to Rancourt's submission that there is a conflict in the evidence over President Rock's motive for funding St. Lewis' defamation action, I find that even if the subsequent affidavits were considered, there is simply no evidence that Rancourt has produced showing that the University had an improper motive for funding an employee's defamation action other than his speculation about a possible improper motive because he is in a labour dispute with the University.

75 I am also not satisfied that there is a conflict in the evidence related to the motive by President Rock. He has sworn an affidavit setting forth his reasons for agreeing to fund St. Lewis' defamation action. He has been cross-examined on his affidavit and no contradictions have arisen from President Rock's cross-examination that would warrant a trial of this issue.

76 I also find that to order a trial of an issue after extensive cross-examinations were conducted, where the parties have spent time and incurred substantial expense over an 11 month period, where Rancourt has changed his approach and now seeks to have his motion turned into a trial of an issue would be inconsistent with the principles set out in Rule 1.04. Rancourt's request to convert his motion into a trial of an issue would create unnecessary expense and delay and is not necessary to secure a just result because the issues have already been defined by Rancourt in his January motion materials and the respondents in their responding affidavits as confirmed by Beaudoin J.'s decision. There is only mere speculation by Rancourt that the University agreed to fund St. Lewis' defamation action for an improper purpose or improper motive.

Disposition of Issue #2

77 For the above reasons, a trial of the issues raised in this motion will not be ordered.

Issue #3 Does the University's agreement to pay for St. Lewis' legal costs of her defamation action against Rancourt constitute champerty and maintenance?

Maintenance

78 Maintenance is defined as the officious intermeddling in the litigation of others for an improper purpose. At p. 157, in the *Introduction to the Canadian Law of Torts*, G.H.L. Fridman 2nd ed., LexisNexis, Canada, 2003, the author states as follows:

Maintenance is the officious intermeddling in the litigation of others, for an improper motive, when the maintainer has no personal interest in such litigation and the assistance, which usually takes the form of financial support, is unjustified. Champerty occurs when, in return for such support, the parties to the arrange-

ment agree that any profits of the action will be shared between them. Champerty is an "aggravated" or "egregious" form of maintenance, in which there is the added element that the maintainer shares the profits of the litigation. Without maintenance there can be no champerty.

79 In *The Law of Civil Procedure in Ontario*, Morden and Perell, 1st ed., LexisNexis, Toronto, 2010, at pages 72-73 the authors state that maintenance and champerty were torts and state as follows:

The presence of maintenance or champerty may be a bar to a proceeding. Maintenance and champerty are torts, and they were once regarded as criminal offences. The gravamen of these torts is a person's officious intermeddling or profiteering in another person's lawsuit. ... An action that involves maintenance or champerty may be dismissed as an abuse of process. (*Operation 1 Inc. v. Phillips*, [2004] O.J. No. 5290 (Ont. S.C.J.) and *Wong v. Second Cup Ltd.*, [2005] O.J. No. 2897 (Ont. Master))

80 At page 73, Morden and Perell write:

The focus of attention of maintenance ... There is no maintenance unless there is an improper motive, (*Lorch v. McHale*, [2008] O.J. No. 2807, 92 O.R. (3d) 305 (Ont. S.C.J.); *S. v. K.*, [1986] O.J. No. 3035, 55 O.R. (2d) 111 (Ont. Dist. Ct.)) and there is no maintenance if the alleged maintainer has a legitimate reason or justification for assisting the litigant. (*Lorch v. McHale*, *supra*; *Morgan v. Stefanini*, [2005] O.J. No. 1606 (Ont. S.C.J.); *Ingle v. ACA Assurance*, [2005] O.J. No. 4653 (Ont. S.C.J.))

81 In *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257 (Ont. C.A.) at para. 34, the Court of Appeal stated as follows on the subject of maintenance:

For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.

82 To summarize the above cases and statements, in order to succeed on his motion to obtain a stay of the action as an abuse of process based on maintenance and champerty, Rancourt must show that:

- (a) there has been officious intermeddling by the University, namely, that the University has funded St. Lewis' defamation action that she would not have otherwise pursued;
 - (b) the University did not have a legitimate reason or justification for assisting St. Lewis by providing funding; and
 - (c) the University had an improper motive for funding St. Lewis' libel action.
- (a) **Officious intermeddling**

83 The uncontradicted evidence of St. Lewis and Dean Feldthusen was that St. Lewis had decided to sue Rancourt for defamation before she asked the University to pay for her legal fees to do

so. Dean Feldthusen supported St. Lewis' request for funding and arranged a meeting with the President of the University. President Allan Rock agreed, on behalf of the University, to pay St. Lewis' legal costs to sue Rancourt for defamation to protect her reputation as an employee of the University.

84 In *Hill v. Church of Scientology of Toronto*, [1992] O.J. No. 451 (S.C.J.), aff'd [1995] 2 S.C.R. 1130, the Supreme Court of Canada found no impropriety in the Government of Ontario funding an employee's libel action against a private entity. The University of Ottawa is a private entity and is not a governmental body, however, does receive grants from governments.

85 The reason the University agreed to pay St. Lewis' legal costs for her libel action were set out in a letter from the University's counsel, David Scott, which were referred to in the facts above. The relevant parts of the University's reasons were that the alleged defamatory remarks about St. Lewis were occasioned by work, which she undertook at the request of the University and in the course of her duties and responsibilities as an employee of the University. Her efforts were not personal but in the interest of the University. Furthermore, the racist attack upon her took this case out of the ordinary and in the view of the University created a moral obligation to provide support for her in defence of her reputation.

86 The uncontradicted evidence before me is that the University agreed to pay an employee's legal fees, in this case, Professor St. Lewis, to fund her libel action which was commenced to defend her reputation. I therefore find that the University's agreement to fund an employee's defamation action does not, as was the case in *Hill v. Church of Scientology of Toronto*, *ibid*, constitute of-ficious intermeddling in litigation as St. Lewis had decided to sue Rancourt for libel to protect her reputation before the University agreed to fund her legal fees.

(b) and (c) *Legitimate reason or justification for assisting St. Lewis or improper purpose*

87 Rancourt speculates and alleges that Allan Rock as President of the University had an improper motive for funding St. Lewis' libel action against him. He alleges that the University agreed to fund her defamation action in order to stigmatize and silence him after the University dismissed him from his full tenured professorship on April 1, 2009.

88 There can be no maintenance if the University had a legitimate reason or justification for assisting the litigant. The evidence is uncontradicted from President Rock, Mr. Giroux, Dean Feldthusen and St. Lewis that, the University's reasons for assisting St. Lewis by paying her legal fees, was to defend her reputation. The reasons were set out in the letter from its counsel, David Scott, namely, because her reputation was attacked during the course of her employment by the University and also because the University felt that it had a moral obligation to assist her to defend her reputation in these special circumstances from a racist attack.

89 In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, the Supreme Court of Canada made several comments about the fact that the Ontario Government paid for the legal fees for the Crown Attorney, S. Casey Hill, to sue the Church of Scientology for libel. Similar allegations to those made by Rancourt were levelled at the Ontario Government. Paragraph 70 of the *Hill* decision reads as follows:

They further submit that Casey Hill commenced these legal proceedings at the direction and with the financial support of the Attorney General in order to vindicate the damage to the reputation of the Ministry resulting from criticism levelled at the conduct of one of its officials. It is, therefore, contended that this action represents an effort by a government department to use the action of defamation to restrict and infringe the freedom of expression of the appellants in a manner that is contrary to the Charter.

90 At para. 71, the Supreme Court states that "These submissions cannot be accepted. They have no legal, evidentiary or logical basis of support." At para. 75, the Court continued by stating that "The appellants impugned the character, competence and integrity of Casey Hill, himself, and not that of the government. He, in turn, responded by instituting legal proceedings in his own capacity."

91 In *Hill v. Church of Scientology of Toronto*, *ibid*, the Government of Ontario paid for the legal costs for one of its Crown Attorney, S. Casey Hill, to fund a libel action against the Church of Scientology. Rancourt is speculating that the University had other improper motives, namely to silence him. However, they are not supported by any evidence as his allegation denied by President Rock, by St. Lewis, by Dean Feldthusen and by Mr. Giroux. The University does not deny that it terminated Rancourt and he is involved in a labour arbitration with his union to determine whether his dismissal was justified. This is a separate issue and does not constitute evidence of an improper motive on the part of the University.

92 Rancourt's speculation that the University agreed to pay St. Lewis' legal costs of her defamation action in order to silence and stigmatize him is unsupported by any evidence. Even if the April 23rd and May 23rd affidavits were considered, I find that the evidence introduced by Rancourt does not contradict the evidence of Mr. Rock, Ms. Lewis, Dean Feldthusen or Mr. Giroux, with regards with the reasons that the University agreed to fund St. Lewis' defamation action against the defendant. As a result, there is no issue of credibility on these matters that require a trial of an issue.

93 The situation for St. Lewis is very similar to those in the case of *Hill v. Church of Scientology* as St. Lewis was an employee and made her own decision to commence a libel action to defend her reputation and the University, as her employer, agreed to pay for her legal costs because her reputation was damaged in the course of her employment. I find that the University had a legitimate reason for assisting St. Lewis and there is no evidence that the University agreed to fund St. Lewis' libel action for an improper purpose or based on an improper motive.

Champerty

94 As set out in para. [78] of this decision:

Champerty is an "aggravated" or "egregious" form of maintenance, in which there is the added element that the maintainer shares the profits of the litigation.

95 The uncontradicted evidence before me is that there was never any agreement between St. Lewis and the University to share in the proceeds of the libel action. The University agreed to fund St. Lewis' costs to pursue a defamation action against Rancourt to defend her reputation at the

meeting of April 15, 2011 without any agreement that the University would share in the proceeds of the litigation.

96 Professor St. Lewis decided, when issuing her statement of claim, that half of any punitive damages awarded would be paid to a scholarship fund. Her statement of claim was issued after the University agreed to pay for her legal costs. St. Lewis' unilateral decision to donate a share of the punitive damages awarded to a scholarship fund administered through the University does not constitute a contractual agreement to share in the proceeds. This proposal could be unilaterally revoked by St. Lewis at any time.

97 I therefore find that the University's agreement to fund St. Lewis' defamation action did not constitute champerty because there was no agreement that the University would share in the proceeds of the action.

Was there trafficking in litigation?

98 In *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, at para. 8, Strathy J. dismissed a defendant's claim that a third party funding agreement in a class action was champertous and unlawful under *An Act respecting Champerty*, R.S.O. 1897, c. 327.

99 At para. 33, Strathy J. stated:

- (a) ... Just as contingency fee agreements have been recognized as providing access to justice, so too third party indemnity agreements can avoid the unfortunate result that individuals with potentially meritorious claims cannot bring them because they are unable to withstand the risk of loss: see *McIntyre Estate* at para. 55.
- (b) There is no evidence that CFI stirred up, incited or provoked this litigation, within the meaning of the term "moved" in s. 1 of the *Champerty Act*: see *McIntyre Estate* at para. 41. On the contrary, the plaintiffs demonstrated a clear intention to proceed with this litigation before CFI came on the scene.

100 In this case, St. Lewis advised Dean Feldthusen that she had to sue Rancourt for defamation and requested that the University provide funding for her legal costs.

101 An action will be dismissed as being frivolous and vexatious or abusive under Rule 21.03(3)(d) only in the clearest of the cases if on the face of the action and in circumstances where it is plain and obvious that the case cannot succeed. In *Sussman v. Ottawa Sun*, [1997] O.J. No. 181, (Ont. Gen. Div.), the court held that the maintenance and champerty were not defences to an action and as such, pleas will not be struck out.

102 In *Operation 1 Inc. v. Phillips*, 2004 CanLII 48689 (ON SC), at paras. 45 and 47, Cullity J. held that an action will rarely be stayed or dismissed as an abuse of process based on a champertous agreement. He held that the champerty must rise to a level of "trafficking in litigation", namely be an "unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation", to be considered an abuse of process, even then a stay will not necessarily be granted.

103 I find the University's agreement to fund St. Lewis' libel action does not constitute trafficking in litigation because St. Lewis had already decided to sue to protect her reputation and there

is no evidence of the University buying or selling rights to litigation as it did not even have an agreement to share in the proceeds of the action.

Disposition of Issue #3

104 I find that when the University agreed to pay for St. Lewis' legal fees for her defamation action as an employee to assist her to defend her reputation, which was allegedly damaged in the course of her employment for the University, does not constitute officious intermeddling, is a legitimate reason or justification for assisting her and does not constitute an improper purpose. I have found that the University did not enter into an agreement to share in the proceeds of litigation, and as a result, I find there is no champerty. For the same reason, the University's agreement to fund the costs of the libel action does not rise to the level of trafficking in litigation as there was no purchase or sale of rights to the libel action by the University.

Disposition of Motion

105 Rancourt's motion to stay or dismiss the action on the basis that the agreement of the University to fund St. Lewis' defamation action was the product of maintenance and champerty is dismissed.

Costs

106 The plaintiff and the University shall have fifteen (15) days to make submissions on costs, the defendant Rancourt shall have fifteen (15) days to respond and St. Lewis and the University shall have ten (10) days to reply.

R.J. SMITH J.

cp/e/qlqqs/qlrdp/qlbdp/qlwxy

¹ *BASF Canada Inc. v. Max Auto Supply (1986) Inc.*, [1998] O.J. No. 3676 at para. 10 (S.C.J.) (Master Beaudoin); *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767 at para. 14 (S.C.J.) (Master Macleod).

TAB V

Le Syndicat des employés de bureau de l'Hydro-Québec, Section locale 2000, Syndicat canadien de la Fonction publique, et al. *Applicants*;

and

Attorney General of the Province of Quebec
Respondent;

and

Hydro-Québec

and

Le Syndicat des employés de métier de l'Hydro-Québec, Section locale 1500, Syndicat canadien de la Fonction publique, et al.

and

Le Syndicat des techniciens de l'Hydro-Québec, Section locale 957, Syndicat canadien de la Fonction publique, et al.
Mis-en-cause.

1972: June 19; 1972: June 29.

Present: Fauteux, C.J. and Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon and Laskin JJ.

MOTION FOR LEAVE TO APPEAL

Appeal—Motion for leave to appeal—Injunction to refrain from strike and to maintain the essential services for a certain period of time—Right of appeal from Superior Court to Supreme Court of Canada—Supreme Court Act, R.S.C. 1952, c. 259, s. 41(1)—Labour Code, sec. 99.

The Superior Court allowed a petition submitted by the Attorney General under s. 99 of the *Labour Code*, and issued an injunction ordering the applicants to refrain from any strike and to maintain the essential services of the Hydro-Québec, until the date of the order in council provided for in s. 99. The applicants request leave to appeal from this judgment to this Court.

The petition has been referred to the Court in order to determine the question of its jurisdiction in this matter before a decision is made on this motion.

P. Cutler, Q.C., for the applicants.

Le syndicat des employés de bureau de l'Hydro-Québec, Section locale 2000, Syndicat canadien de la Fonction publique, et al. *Requérants*;

et

Le procureur général de la province de Québec *Intimé*;

et

Hydro-Québec

et

Le syndicat des employés de métier de l'Hydro-Québec, Section locale 1500, Syndicat canadien de la Fonction publique, et al.

et

Le syndicat des techniciens de l'Hydro-Québec, Section locale 957, Syndicat canadien de la Fonction publique, et al.
Mis-en-cause.

1972: le 19 juin; 1972: le 29 juin.

Présents: Le Juge en Chef Fauteux et les Juges Abbott, Martland, Judson, Ritchie, Hall, Spence, Pigeon et Laskin.

REQUÊTE POUR AUTORISATION D'APPELER

Appel—Requête pour autorisation d'appeler—Injonction visant l'abstention de droit de grève et le maintien de services essentiels pour une certaine période—Droit d'appeler de la Cour supérieure à la Cour suprême du Canada—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41(1)—Code du Travail, art. 99.

La Cour supérieure a fait droit à la requête dont elle fut saisie par le Procureur général, en vertu de l'art. 99 du *Code du Travail*, et a décerné une injonction enjoignant aux requérants de s'abstenir de toute grève et de maintenir les services essentiels de l'Hydro-Québec, jusqu'à la date du décret ministériel prévu à l'art. 99. Ces derniers veulent appeler de ce jugement à cette Cour.

La demande a été référée à la Cour pour que soit tranchée la question de la juridiction de cette Cour avant qu'il ne soit statué sur la présente demande.

P. Cutler, c.r., pour les requérants.

J. Marchessault, Q.C., for the respondent.

Y. Bertrand, for the mise-en-cause, Hydro-Québec.

The following judgment was delivered:

The Court, being of the opinion that the judgment of the Honourable Jean Saint-Germain of the Superior Court, granting, on March 28, 1972, the petition presented by the Attorney General of the Province of Quebec under s. 99 of the *Labour Code of Quebec*, is, in law, a judgment from which an appeal lies to the Court of Appeal of the Province of Quebec, it follows that no appeal lies from that judgment to this Court under s. 41 of the *Supreme Court Act*.

The motion for leave to appeal to this Court is dismissed with costs.

Motion dismissed with costs.

Solicitors for the applicants: Cutler, Langlois and Castiglio, Montreal.

Solicitors for the respondent: Geoffrion and Prud'Homme, Montreal.

J. Marchessault, c.r., pour l'intimé.

Y. Bertrand, pour la mise-en-cause, Hydro-Québec.

Le jugement suivant a été rendu:

La Cour étant d'avis que le jugement de l'honorable Jean Saint-Germain de la Cour supérieure, accordant, le 28 mars 1972, la requête présentée par le procureur général de la province de Québec en vertu de l'art. 99 du *Code du travail du Québec*, est, en droit, un jugement susceptible d'appel à la Cour d'appel de la province de Québec, il s'ensuit qu'il ne peut être interjeté appel de ce jugement à cette Cour en vertu de l'art. 41 de la *Loi sur la Cour suprême*.

La demande d'autorisation d'appeler à cette Cour est rejetée avec dépens.

Motion rejetée avec dépens.

Procureurs des requérants: Cutler, Langlois et Castiglio, Montréal.

Procureurs de l'intimé: Geoffrion et Prud'Homme, Montréal.

TAB W

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Respondents/Appellants*

and between

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band) *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band *Intervenors*

INDEXED AS: WEWAYKUM INDIAN BAND v. CANADA

Roy Anthony Roberts, C. Aubrey Roberts et John Henderson, poursuivant en leur nom et au nom de tous les autres membres de la Bande indienne Wewaykum (également connue sous le nom de Bande indienne de Campbell River) *Appellants*

c.

Sa Majesté la Reine *Intimée*

et

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu et James D. Wilson, poursuivant en leur nom et au nom de tous les autres membres de la Bande indienne Wewaikai (également connue sous le nom de Bande indienne de Cape Mudge) *Intimés/Appellants*

et entre

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite et Lloyd Chickite, poursuivant en leur nom et au nom de tous les autres membres de la Bande indienne Wewaikai (également connue sous le nom de Bande indienne de Cape Mudge) *Appellants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Bande indienne Gitanmaax, Bande indienne Kispiox et Bande indienne de Glen Vowell *Intervenants*

RÉPERTORIÉ : BANDE INDIENNE WEWAYKUM c. CANADA

Neutral citation: 2003 SCC 45.

File No.: 27641.

2003: June 23; 2003: September 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel and Deschamps JJ.

MOTION FOR DIRECTIONS**MOTIONS TO VACATE A JUDGMENT**

Courts — Judges — Impartiality — Reasonable apprehension of bias — Supreme Court judgment dismissing Indian bands' appeals — Indian bands presenting motions to set aside judgment alleging reasonable apprehension of bias arising from involvement of judge in bands' claims while serving as federal Associate Deputy Minister of Justice over 15 years prior to hearing of appeals — Whether judgment tainted by reasonable apprehension of bias — Whether judgment should be set aside.

In 1985 and 1989 respectively, the Campbell River Band and the Cape Mudge Band instituted legal proceedings against each other and the Crown, each band claiming exclusive entitlement to two reserves on Vancouver Island. In 1995, the Federal Court, Trial Division dismissed the actions and the Federal Court of Appeal upheld the decision. In December 2002, in reasons written by Binnie J. and concurred in unanimously, this Court dismissed the bands' appeals. In February 2003, the Campbell River Band made an access to information request to the federal Department of Justice seeking copies of all records to, from or which make reference to Mr. Binnie concerning the bands' claims against the Crown. Mr. Binnie, when he was Associate Deputy Minister of Justice in 1982-1986, had been responsible for all litigation, except tax matters and cases in Quebec, involving the Government of Canada and had supervisory authority over thousands of cases. The Department of Justice found a number of internal memoranda which indicate that, in late 1985 and early 1986, Mr. Binnie had received some information concerning the Campbell River Band's claim and that he had attended a meeting where the claim was discussed. The Crown filed a motion in this Court seeking directions as to any steps to be taken. Binnie J. recused himself from any further proceedings in this matter and filed a statement setting out that he had no recollection of personal involvement in the case. The bands sought an order setting aside this Court's judgment. Both bands agree that actual bias is not at issue and accept Binnie J.'s statement that he had no

Référence neutre : 2003 CSC 45.

N° du greffe : 27641.

2003 : 23 juin; 2003 : 26 septembre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel et Deschamps.

REQUÊTE SOLLICITANT DES DIRECTIVES**REQUÊTES EN ANNULATION DE JUGEMENT**

Tribunaux — Juges — Impartialité — Crainte raisonnable de partialité — Pourvois de bandes indiennes rejetés par la Cour suprême — Présentation par les bandes indiennes de requêtes en annulation du jugement fondée sur la crainte raisonnable de partialité qui découlerait du rôle joué par un juge dans les demandes des bandes en tant que sous-ministre adjoint de la Justice plus de 15 ans avant l'audition des appels — Le jugement est-il entaché d'une crainte raisonnable de partialité? — Y a-t-il lieu d'annuler le jugement?

En 1985 et 1989 respectivement, la bande de Campbell River et la bande de Cape Mudge ont intenté une action en justice, chacune poursuivant l'autre ainsi que la Couronne et revendiquant le droit exclusif à deux réserves situées dans l'île de Vancouver. En 1995, la section de première instance de la Cour fédérale a rejeté les actions et la Cour d'appel fédérale a confirmé cette décision. En décembre 2002, notre Cour a rejeté les pourvois des bandes dans des motifs exposés par le juge Binnie, auxquels ont souscrit tous les autres juges de la Cour. En février 2003, la bande de Campbell River a présenté au ministère de la Justice une demande d'accès à l'information dans laquelle elle sollicitait des copies de tous les documents qui soit avaient été expédiées à M. Binnie, soit émanaient de ce dernier ou encore faisaient mention de lui et qui se rapportaient aux demandes présentées contre le gouvernement fédéral par les bandes. Lorsqu'il a occupé le poste de sous-ministre adjoint de la Justice, de 1982 à 1986, M. Binnie était responsable de tous les litiges auxquels était partie le gouvernement fédéral, sauf les affaires fiscales et celles se déroulant au Québec, et il supervisait des milliers de dossiers. Le ministère de la Justice a trouvé un certain nombre de notes de service internes qui indiquent que, à la fin de 1985 et au début de 1986, M. Binnie a reçu certains renseignements concernant la demande de la bande de Campbell River et a assisté à une réunion au cours de laquelle cette demande a été discutée. La Couronne a présenté à notre Cour une requête sollicitant des directives quant aux mesures qui pourraient devoir être prises. Le juge Binnie s'est

recollection of personal involvement in the case. However, they allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of the Campbell River Band's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias.

Held: The motion for directions and the motions to vacate a judgment should be dismissed. In the circumstances of this case, no reasonable apprehension of bias is established and hence Binnie J. was not disqualified from hearing the appeals or participating in the judgment.

Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?

It is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias and the notion of automatic disqualification. Most arguments for disqualification are not based on actual bias. When parties say that there was no actual bias on the part of a judge, it can mean one of three things: (1) that reasonable apprehension is a surrogate for actual bias; (2) that unconscious bias can exist even where the judge acted in good faith; and (3) that looking for real bias is simply not the relevant inquiry since justice should not only be done but must be seen to be done. This third justification for the objective standard of reasonable apprehension of bias envisions the possibility that a judge may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his disqualification. The idea that "justice must be seen to be done" cannot be severed from the

récusé à l'égard de toutes procédures ultérieures dans cette affaire et il a déposé une déclaration précisant qu'il n'avait aucun souvenir d'avoir participé personnellement à ce dossier. Les bandes ont demandé une ordonnance portant annulation du jugement de notre Cour. Les deux bandes reconnaissent qu'il ne s'agit pas d'une affaire de partialité réelle et elles acceptent la déclaration du juge Binnie selon laquelle il n'avait aucun souvenir d'avoir participé personnellement à cette affaire. Cependant, elles font valoir que le rôle joué par le juge Binnie en tant que sous-ministre adjoint de la Justice aux premiers stades de la demande de la bande de Campbell River en 1985 et 1986 fait naître une crainte raisonnable de partialité.

Arrêt : La requête sollicitant des directives et les requêtes en annulation de jugement sont rejetées. À la lumière des circonstances de l'espèce, aucune crainte raisonnable de partialité n'a été établie et le juge Binnie n'était pas inhabile à connaître des présents pourvois et à participer au jugement.

La confiance du public dans notre système juridique prend sa source dans la conviction fondamentale selon laquelle ceux qui rendent jugement doivent non seulement toujours le faire sans partialité ni préjugé, mais doivent également être perçus comme agissant ainsi. L'impartialité du juge doit être présumée et c'est à la partie qui plaide l'inhabilité qu'incombe le fardeau d'établir que les circonstances permettent de conclure que le juge doit être récusé. Le critère de récusation est la crainte raisonnable de partialité. Il consiste à se demander à quelle conclusion arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, le juge, consciemment ou non, ne rendra pas une décision juste?

Il est nécessaire de clarifier le rapport entre cette norme objective et deux autres facteurs : le facteur subjectif de la partialité réelle et la notion d'inhabilité automatique. Dans la plupart des cas où l'inhabilité du décideur est invoquée, la partie qui la soulève n'invoque pas la partialité réelle. Lorsque des parties affirment qu'il y avait absence de partialité réelle de la part du juge, cela peut signifier l'une des trois choses suivantes : (1) que la crainte raisonnable de partialité est un critère de remplacement de la partialité réelle; (2) qu'il peut y avoir partialité inconsciente, même lorsque le juge a agi de bonne foi; (3) que la présence ou l'absence de partialité réelle n'est tout simplement pas la bonne question à se poser, puisque justice doit non seulement être rendue mais elle doit également paraître être rendue. Cette troisième justification de la norme objective de la crainte raisonnable de partialité admet la possibilité qu'un juge puisse être totalement

standard of reasonable apprehension of bias. The relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. With respect to the notion of automatic disqualification, recent English case law suggests that automatic disqualification is justified in cases where a judge has an interest in the outcome of a proceeding. This case law is not helpful here because automatic disqualification does not extend to judges somehow involved in the litigation or linked to counsel at an earlier stage. In Canada, proof of actual bias or a reasonable apprehension of bias is required. In any event, on the facts of this case, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

In this case, disqualification can only be based on a reasonable apprehension of bias. In light of the strong presumption of judicial impartiality, the standard refers to an apprehension based on serious grounds. Each case must be examined contextually and the inquiry is fact-specific. Where, as here, the issue of bias arises after judgment has been rendered, it is not helpful to determine whether the judge would have recused himself had the matter come to light earlier. Although the standard remains the same, an abundance of caution guides many, if not most judges, at this early stage, and judges often recuse themselves where it is not legally necessary. Lastly, this Court's dictum that judges should not preside over a case in which they played a part at any stage is but an illustration of the general principle. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification, but rather suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he is presiding, and could take this fact as the foundation of a reasonable apprehension of bias.

Here, neither Binnie J.'s past status as Associate Deputy Minister nor his long-standing interest in matters involving First Nations is by itself sufficient to justify his disqualification. The source of concern for the bands is

impartial dans des circonstances faisant néanmoins naître une crainte raisonnable de partialité requérant qu'il soit déclaré inhabile. L'idée selon laquelle « justice doit paraître être rendue » ne peut être dissociée de la norme de la crainte raisonnable de partialité. La question pertinente n'est pas de savoir si, dans les faits, le juge a fait preuve de partialité consciente ou inconsciente, mais si une personne raisonnable et bien renseignée craindrait qu'il y ait eu partialité. Relativement à la notion d'inhabilité automatique, certains arrêts britanniques récents suggèrent que l'application de cette notion est justifiée lorsque le juge a un intérêt dans l'issue de l'instance. Cette jurisprudence n'est pas utile en l'espèce, parce que la règle de l'inhabilité automatique ne s'applique pas dans les cas où le décideur a, d'une certaine façon, participé au litige ou été en contact avec les avocats aux premiers stades de l'affaire. Au Canada, il faut prouver l'existence de partialité réelle ou d'une crainte raisonnable de partialité. Quoi qu'il en soit, au vu des faits de l'espèce, rien n'indique que le juge Binnie avait quelque intérêt pécuniaire dans les pourvois ou qu'il manifestait pour l'objet de l'affaire un intérêt tel qu'il se trouvait effectivement dans la position d'une partie à la cause.

Dans la présente affaire, l'inhabilité ne peut être invoquée que sur le fondement de la crainte raisonnable de partialité. Vu la forte présomption d'impartialité dont jouissent les tribunaux, la norme exige une crainte de partialité fondée sur des motifs sérieux. Chaque affaire doit être examinée au regard du contexte et des faits qui lui sont propres. Lorsque, comme en l'espèce, la question de l'inhabilité se soulève après le prononcé du jugement et non au début de l'instance, il n'est pas utile de se demander si le juge se serait recusé si la situation avait été connue plus tôt. Quoique la norme reste la même, bon nombre de juges, sinon la plupart d'entre eux, font montre d'une prudence extrême tôt dans l'instance, et il arrive souvent qu'ils se recusent alors qu'ils ne seraient pas légalement tenus de le faire. Enfin, la remarque incidente de notre Cour selon laquelle les juges ne doivent pas siéger dans une cause à laquelle ils ont participé à quelque stade de l'affaire n'est qu'une illustration du principe général. Elle ne dit pas que toute participation dans le passé à une affaire est automatiquement cause d'inhabilité, mais elle indique plutôt qu'une personne sensée et raisonnable verrait vraisemblablement d'un mauvais oeil le fait que le juge a agi comme avocat dans une affaire dont il est saisi, et que cette personne pourrait considérer que ce fait naître une crainte raisonnable de partialité.

En l'espèce, ni le fait que le juge Binnie ait dans le passé occupé la charge de sous-ministre adjoint ni son intérêt de longue date pour les questions concernant les Premières nations ne justifient en soi de conclure

Binnie J.'s involvement in this case in the mid-1980s. The documentary record, however, does not support a reasonable apprehension of bias. Binnie J.'s involvement in the dispute was confined to a limited supervisory and administrative role. While his link to this litigation exceeded *pro forma* management of the files, he was never counsel of record and played no active role after the claim was filed, nor did he plan litigation strategy. Any views attributed to Binnie J. earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation. Furthermore, in his capacity of Associate Deputy Minister, he was responsible for thousands of files at the relevant time and the matter on which he was involved in this file was not unique to this case but was an issue of general application to existing reserves in British Columbia. More importantly, Binnie J.'s supervisory role dates back over 15 years. This lengthy period is significant in relation to Binnie J.'s statement that he had no recollection of his involvement because it is a factor that a reasonable person would properly consider, and it makes bias or its apprehension improbable. Nor would a reasonable person, viewing the matter realistically, conclude that Binnie J.'s ability to remain impartial was unconsciously affected by a limited administrative and supervisory role dating back over 15 years.

Even if the involvement of a single judge had given rise to a reasonable apprehension of bias in this case, no reasonable person informed of the decision-making process of this Court and viewing it realistically could conclude that the eight other judges who heard the appeals were biased or tainted.

Cases Cited

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **distinguished:** *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 2 W.L.R. 272; **referred to:** *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*, [2000] Q.B. 451; *R. v. Bertram*, [1989] O.J. No. 2123 (QL); *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *R. v. Gough*, [1993] A.C. 646; *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167; *The King v. Sussex Justices, Ex parte*

à son inhabilité. La préoccupation des bandes est la participation du juge Binnie à la présente affaire au milieu des années 1980. La preuve documentaire n'étaye toutefois pas l'existence d'une crainte raisonnable de partialité. Le juge Binnie n'a joué dans le différend en cause qu'un rôle de supervision et d'administration limité. Bien que le lien entre le juge Binnie et le présent litige ait dépassé la gestion *pro forma* des dossiers, ce dernier n'a jamais été l'avocat inscrit au dossier et il n'a pas joué de rôle actif dans le différend après le dépôt de l'action ni planifié la stratégie d'instance. Les opinions attribuées au juge Binnie ont été formulées dans le contexte des répercussions plus larges du processus de négociation plutôt que dans le contexte du litige. De plus, en sa qualité de sous-ministre adjoint, il était responsable de milliers de dossiers à l'époque pertinente et la question sur laquelle il s'est penché dans la présente affaire ne touchait pas exclusivement celle-ci mais concernait en général les réserves existantes en Colombie-Britannique. Fait plus important encore, le rôle limité de supervision qu'a joué le juge Binnie remonte à plus de 15 ans. Ce très long délai est important en ce qui concerne la déclaration du juge Binnie selon laquelle il n'avait aucun souvenir de sa participation à cette affaire, parce qu'il s'agit d'un facteur dont la personne raisonnable tiendrait à juste titre compte et qui rend improbable l'existence de partialité ou de crainte de partialité. Considérant la question de façon réaliste, cette personne ne conclurait pas non plus que le rôle limité d'administration et de supervision qu'a joué le juge Binnie dans ce dossier, il y a de cela plus de 15 ans, a inconsciemment influencé sa capacité de demeurer impartial.

Même si le rôle joué par un seul juge avait fait naître une crainte raisonnable de partialité en l'espèce, aucune personne raisonnable connaissant le processus décisionnel de notre Cour et le considérant de façon réaliste ne saurait conclure que les huit autres juges étaient partiaux ou ont été influencés.

Jurisprudence

Arrêt appliqué : *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **distinction d'avec l'arrêt :** *R. c. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*, [1999] 2 W.L.R. 272; **arrêts mentionnés :** *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *Locabail (U.K.) Ltd. c. Bayfield Properties Ltd.*, [2000] Q.B. 451; *R. c. Bertram*, [1989] O.J. No. 2123 (QL); *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *R. c. Gough*, [1993] A.C. 646; *The Queen c. Barnsley Licensing Justices*, [1960] 2 Q.B. 167; *The King c.*

McCarthy, [1924] 1 K.B. 256; *Dimes v. Proprietors of the Grand Junction Canal* (1852), 3 H.L.C. 759, 10 E.R. 301; *Man O'War Station Ltd. v. Auckland City Council* (Judgment No. 1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28; *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33.

Statutes and Regulations Cited

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Indian Act, R.S.C. 1985, c. I-5.
Rules of the Supreme Court of Canada, SOR/2002-156, Rule 3.

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 Wilson, Bertha. "Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227.

MOTION FOR DIRECTIONS and MOTIONS TO VACATE a judgment of the Supreme Court of Canada, *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79. Motions dismissed.

Michael P. Carroll, Q.C., and *Malcolm Maclean*, for the appellants Roy Anthony Roberts et al.

John D. McAlpine, Q.C., and *Allan Donovan*, for the respondents/appellants Ralph Dick et al.

J. Vincent O'Donnell, Q.C., and *Jean Bélanger*, for the respondent Her Majesty the Queen.

Written submissions only by *Patrick G. Foy, Q.C.*, and *Angus M. Gunn, Jr.*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Peter R. Grant* and *David Schulze*, for the interveners the Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band.

The following is the judgment delivered by

THE CHIEF JUSTICE AND GONTHIER, IACOBUCCI, MAJOR, BASTARACHE, ARBOUR, LEBEL AND DESCHAMPS JJ. —

I. Introduction

The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape

Sussex Justices, Ex parte McCarthy, [1924] 1 K.B. 256; *Dimes c. Proprietors of the Grand Junction Canal* (1852), 3 H.L.C. 759, 10 E.R. 301; *Man O'War Station Ltd. c. Auckland City Council* (Judgment No. 1), [2002] 3 N.Z.L.R. 577, [2002] UKPC 28; *Panton c. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33.

Lois et règlements cités

Loi sur l'accès à l'information, L.R.C. 1985, ch. A-1.
Loi sur les Indiens, L.R.C. 1985, ch. I-5.
Règles de la Cour suprême du Canada, DORS/2002-156, art. 3.

Doctrine citée

Conseil canadien de la magistrature. *Principes de déontologie judiciaire*. Ottawa : Le Conseil, 1998.
 Wilson, Bertha. "Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227.

REQUÊTE SOLLICITANT DES DIRECTIVES et REQUÊTES EN ANNULATION de l'arrêt de la Cour suprême du Canada, *Bande indienne Wewaykum c. Canada*, [2002] 4 R.C.S. 245, 2002 CSC 79. Requêtes rejetées.

Michael P. Carroll, c.r., et *Malcolm Maclean*, pour les appelants Roy Anthony Roberts et autres.

John D. McAlpine, c.r., et *Allan Donovan*, pour les intimés/appellants Ralph Dick et autres.

J. Vincent O'Donnell, c.r., et *Jean Bélanger*, pour l'intimée Sa Majesté la Reine.

Argumentation écrite seulement par *Patrick G. Foy, c.r.*, et *Angus M. Gunn, Jr.*, pour l'intervenant le procureur général de la Colombie-Britannique.

Argumentation écrite seulement par *Peter R. Grant* et *David Schulze*, pour les intervenantes la Bande indienne Gitanmaax, la Bande indienne Kispiox et la Bande indienne de Glen Vowell.

Version française du jugement rendu par

LA JUGE EN CHEF ET LES JUGES GONTHIER, IACOBUCCI, MAJOR, BASTARACHE, ARBOUR, LEBEL ET DESCHAMPS —

I. Introduction

La bande indienne Wewaykum ou bande indienne de Campbell River (ci-après la « bande de

in law must always do so without bias or prejudice and must be perceived to do so.

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The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 106.)

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Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

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In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

juridique prend sa source dans la conviction fondamentale selon laquelle ceux qui rendent jugement doivent non seulement toujours le faire sans partialité ni préjugé, mais doivent également être perçus comme agissant de la sorte.

L'essence de l'impartialité est l'obligation qu'a le juge d'aborder avec un esprit ouvert l'affaire qu'il doit trancher. À l'inverse, voici comment on a défini la notion de partialité ou préjugé :

[TRADUCTION] . . . une tendance, une inclination ou une prédisposition conduisant à privilégier une partie plutôt qu'une autre ou un résultat particulier. Dans le domaine des procédures judiciaires, c'est la prédisposition à trancher une question ou une affaire d'une certaine façon qui ne permet pas au juge d'être parfaitement ouvert à la persuasion. La partialité est un état d'esprit qui infléchit le jugement et rend l'officier judiciaire inapte à exercer ses fonctions impartialement dans une affaire donnée.

(*R. c. Bertram*, [1989] O.J. No. 2123 (QL) (H.C.), cité par le juge Cory dans *R. c. S. (R.D.)*, [1997] 3 R.C.S. 484, par. 106.)

Considérée sous cet éclairage, « [l']impartialité est la qualité fondamentale des juges et l'attribut central de la fonction judiciaire » (Conseil canadien de la magistrature, *Principes de déontologie judiciaire* (1998), p. 30). Elle est la clé de notre processus judiciaire et son existence doit être présumée. Comme l'ont signalé les juges L'Heureux-Dubé et McLachlin (maintenant Juge en chef) dans l'arrêt *S. (R.D.)*, précité, par. 32, cette présomption d'impartialité a une importance considérable, et le droit ne devrait pas imprudemment évoquer la possibilité de partialité du juge, dont l'autorité dépend de cette présomption. Par conséquent, bien que l'impartialité judiciaire soit une exigence stricte, c'est à la partie qui plaide l'incapacité qu'incombe le fardeau d'établir que les circonstances permettent de conclure que le juge doit être récusé.

En droit canadien, une norme s'est maintenant imposée comme critère de récusation. Ce critère, formulé par le juge de Grandpré dans *Committee for Justice and Liberty c. Office national de l'énergie*, précité, p. 394, est la crainte raisonnable de partialité :

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. *Reasonable Apprehension of Bias and Actual Bias*

Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias, and move on to a consideration of the reasonable apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

... la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Selon les termes de la Cour d'appel, ce critère consiste à se demander « à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, [le décideur], consciemment ou non, ne rendra pas une décision juste? »

Nous reviendrons sous peu sur l'application de cette norme aux circonstances décrites dans la section traitant des faits. D'abord, toutefois, il est nécessaire de clarifier le rapport entre cette norme objective et deux autres facteurs : le facteur subjectif de la partialité réelle et la notion d'incapacité automatique qui refait surface dans de récentes décisions britanniques.

B. *Crainte raisonnable de partialité et partialité réelle*

La question de savoir si, dans les faits, le juge a fait jouer des préjugés ou le ferait se pose rarement. Il va de soi que, lorsque l'existence d'une telle situation peut être établie, elle entraîne inévitablement l'incapacité du juge concerné. Cela dit, toutefois, dans la plupart des cas où la question de l'incapacité est débattue, toutes les parties commencent d'abord par reconnaître qu'il n'y a pas partialité réelle, puis elles passent à l'examen de la question de la crainte raisonnable de partialité. En l'espèce, comme dans beaucoup d'affaires, les parties concèdent qu'il n'y a pas eu partialité réelle de la part du juge Binnie, et la déclaration de ce dernier selon laquelle il n'avait aucun souvenir de sa participation à l'affaire est elle aussi acceptée par tous les intéressés. Comme l'ont indiqué les parties, l'intégrité personnelle du juge Binnie n'est pas mise en doute, ni dans les présents pourvois ni dans quelque autre appel qu'il a entendu en tant que juge de notre Cour. Néanmoins, affirme-t-on, les circonstances de l'espèce sont de nature à faire naître une crainte raisonnable de partialité de la part du juge Binnie. Puisque les deux propositions sont indissociables, il est utile, pour bien comprendre le sens de la notion de crainte raisonnable de partialité, de se demander ce que signifie le fait d'affirmer qu'on ne plaide pas l'incapacité sur le fondement de la partialité réelle.

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Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Pinochet, supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

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To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. Reasonable Apprehension of Bias and Its Application in This Case

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The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

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Three preliminary remarks are in order.

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First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

Peu importe la situation en Grande-Bretagne, la notion d'incapacité automatique prend une couleur différente au Canada, compte tenu de notre insistance sur le fait que l'incapacité doit reposer sur la partialité réelle ou une crainte raisonnable de partialité, critères qui, comme nous l'avons dit, requièrent l'examen de l'état d'esprit du juge, soit au regard des faits soit à travers les yeux de la personne raisonnable. Quoi qu'il en soit, même en supposant que le raisonnement exposé dans l'arrêt *Pinochet*, précité, fasse autorité au Canada, il n'est pas pertinent en l'espèce. Au vu des faits qui nous ont été présentés, rien n'indique que le juge Binnie avait quelque intérêt pécuniaire dans les pourvois ou qu'il manifestait pour l'objet de l'affaire un intérêt tel qu'il se trouvait effectivement dans la position d'une partie à la cause.

Bref, si la question de l'incapacité doit être débattue en l'espèce, elle ne peut l'être que sur le fondement de la crainte raisonnable de partialité. Un tel argument ne pourra être accueilli que si on établit qu'une personne sensée, raisonnable et bien renseignée estimerait que le juge Binnie a, consciemment ou non, été influencée d'une manière inappropriée par sa participation à cette affaire, plus de 15 ans avant que notre Cour n'en soit saisie. Examinons maintenant cet aspect de la question.

D. La crainte raisonnable de partialité et son application en l'espèce

Encore une fois, la question est la suivante : À quelle conclusion arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique? Croirait-elle que, selon toute vraisemblance, le juge Binnie n'a pas rendu, consciemment ou non, une décision juste?

Trois remarques préliminaires s'imposent.

Premièrement, il convient de répéter que la norme exige une crainte de partialité fondée sur des motifs sérieux, vu la forte présomption d'impartialité dont jouissent les tribunaux. À cet égard, le juge de Grandpré a ajouté ces mots à l'expression maintenant classique de la norme de la crainte raisonnable :

TAB X

Court of Appeal
Whitbread v. Walley et al.
Date: 1988-05-12

D.F. McEwen, for appellants Greenwood and Horn.

W.S. Berardino, Q.C., and B.E. McLeod, for appellant Walley.

A.M. Ross and G.A. Nelson, for respondent Whitbread.

W.B. Scarth, Q.C., for Attorney General of Canada.

J.J. Arvey, Q.C., and J. Button, for Attorney General of British Columbia.

(Vancouver Nos. CA008522, CA008519)

May 12, 1988. The judgment of the court was delivered by

MCLACHLIN J.A.:-

INTRODUCTION

[1] On 27th March 1983 the plaintiff Whitbread took a 32-foot pleasure craft called the Calrossie from its moorings in Coal Harbour and set out for the Wigwam Inn at the north end of Indian Arm, a navigable arm of the sea. In the course of the trip, he asked one of his passengers, the defendant Walley, to take over the helm. Whitbread moved to a seat away from the controls and went to sleep.

[2] The Calrossie, with Walley still at the controls, ran aground on the east shore of Indian Arm. Whitbread suffered spinal injuries resulting in quadriplegia.

[3] Whitbread brought an action against Walley and the owners of the Calrossie, Greenwood and Horn. In their defence Greenwood, Horn and Walley assert that their liability is limited under ss. 647 and 649 of the Canada Shipping Act. On a preliminary point of law, A.G. MacKinnon J. [19 B.C.L.R. (2d) 120, 45 D.L.R. (4th) 729] rejected the defendants' contention that the Act limited their liability. He held that Parliament did not intend ss. 647 and 649 to apply to pleasure craft such as the Calrossie, and "read down" the sections to exclude limitation of liability in respect of non-commercial ships used exclusively for pleasure. This appeal is from that ruling.

THE LEGISLATION

business licence was an entirely economic interest and hence not subject to s. 7 of the Charter.

[41] Thus, it appears clear that legislation or state action directly affecting the life, liberty or security of the person falls within s. 7 of the Charter. On the other hand, legislation or state action which is entirely economic falls outside the scope of s. 7. The difficult question, which remains to some extent unresolved, concerns the situation which falls between these two extremes - the case where the measure complained of, while it has an economic aspect, arguably is connected to or affects the life, liberty or security of the person.

[42] This appeal requires us to enter on this difficult middle ground. The plaintiff's case, reduced to its essence, is that the limitations of liability imposed by ss. 647 and 649 of the Canada Shipping Act, while on their face economic, are so directly connected to the physical and psychological liberty and security of his person that s. 7 of the Charter applies.

[43] The case for the connection between the limitation of liability and the liberty and security of the plaintiff is advanced on two related grounds. The first is based on the legal principles underlying the award of damages for personal injury. It is argued that the plaintiff, having been physically injured, is entitled to be restored to his former position: *restitutio in integrum*. Viewed thus, the damage award stands in the stead of the plaintiff's physical loss. To deprive him of what the law would award him but for ss. 647 and 649 is to deny him the right to be indemnified for his physical and psychological loss. This argument may be summed up as follows: a claim for an economic interest which is founded on a deprivation of life, liberty or security of person falls within s. 7 of the Charter.

[44] The second argument has a practical basis. The plaintiff submits that if he is deprived of full compensation for his injuries by the operation of ss. 647 and 649, he will be unable to purchase the care and assistance and benefits in the nature of solace which he would otherwise be able to and will thus suffer an actual deprivation of liberty and security of person, as compared with the state he would be in if no limitation of liability were applied. This argument may be summarized this way: a claim for an economic

interest which may enhance a person's ability to acquire aids and amenities to improve the person's life, liberty or security of person falls under s. 7 of the Charter.

[45] In my opinion, these arguments do not establish that the limitations of liability in ss. 647 and 649 of the Canada Shipping Act constitute a violation of the right to life, liberty and security of person guaranteed by s. 7. The first argument - that s. 7 applies to an economic interest that is based on a loss of life, liberty or security of person - require the words "life, liberty, and security of person" in s. 7 to be read as if they were amplified by the words "or such economic benefit as the law may award in their stead". In the absence of compelling circumstances, I would be loath to embark on a course of reading into the Charter words which its drafters did not see fit to include and which the objectives of the Charter provision in question, as interpreted in *Re B.C. Motor Vehicle Act*, supra, do not require.

[46] The second argument, that economic interests which may affect a person's life, liberty or security of person fall under s. 7, raises the same difficulty. Arguably, it requires reading into s. 7, after the declaration that a person has the right to "life, liberty and security of person", the additional phrase that he has the right to "any *benefit* which may enhance life, liberty or security of person". This argument, however, is undermined by an even more serious problem. It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the Charter and the absence of any reference to the right to property, I cannot accept that this was the intention of its framers.

[47] The matter may be viewed in another way. The deprivation of life, liberty and security of person which the plaintiff has suffered is not *caused* by ss. 647 and 649 of the